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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

DANIEL IMMEDIATO; DIANE IMMEDIATO; AND EUGENE IMMEDIATO,

Petitioners,

v.

RYE NECK SCHOOL DISTRICT; KATHLEEN D. GULOTTA; FRANK SPEDAFINO; BEATRICE CERASOLI; ALAN MANOCHERIAN; JANICE K. ANDERSON; LIZ PERELSTEIN; PETER J. MUSTICH,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

LANCE J. GOTKO
875 Third Avenue
8th Floor
New York, NY
10022
(212) 833-1115

*Counsel of Record

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
CLINT BOLICK
*SCOTT G. BULLOCK
1001 Pennsylvania
Avenue, NW
Suite 200 South
Washington, DC 20004
(202) 457-4240

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

The United States Court of Appeals for the Second Circuit held that a public school district can require students as a condition of high school graduation to perform service to non-profit organizations and agencies in the manner prescribed by school officials without violating the rights of either parents or students. The questions presented for review are:

(1) Did the Second Circuit err in holding the Fourteenth Amendment right of parents to direct their children's education as non-fundamental and in subjecting the school district's mandatory community service program to rational basis review?

(2) Did the Second Circuit err in holding that the decision to perform charitable service to others is not protected by the Fourteenth Amendment's personal liberty guarantee and that the government therefore legally may impose a duty on individuals to serve others?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Mario Gironda, Jr., and his parents, Mario and Sandra Gironda, were plaintiffs in the original proceeding in district court. Through mutual stipulation, they withdrew from the case before judgment was entered by the district court.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 73 F.3d 454 (2d Cir. 1996), and is reprinted in the Appendix. A-1-21. The opinion of the United States District Court for the Southern District of New York is reported at 873 F. Supp. 846 (S.D.N.Y. 1995), and is reproduced in the Appendix. A-24-41.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was entered on January 2, 1996. The Order of the Second Circuit denying reconsideration and rejecting the suggestion for rehearing in banc was entered on February 15, 1996. A-22-23.

This Court has jurisdiction to review the judgment of the Second Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, amendment XIV

SECTION 1. . . . [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . .

42 U.S.C. § 1983

Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected any citizen of the United States or

other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

STATEMENT OF THE CASE

A. Statement of Facts

Starting with the graduating class of 1992, the Rye Neck School District ("the school district") began requiring all students attending Rye Neck High School to perform 40 hours of community service as a condition of graduation. A-46. Community service is defined by the school district as the "direct provision of a basic human service to a person or people in need without remuneration." A-56. Students must perform the required service for "people in need – people who are poor, homeless, handicapped, or in need of education, supervision, or companionship." *Id.*

To carry out this service, students must work with not-for-profit corporations, charities, political organizations, or public agencies. A-47. Such organizations include the American Red Cross, Planned Parenthood, Rye Nature Center, and AIDS Related Community Services. A-57-58. Students may suggest other organizations or agencies for which to perform their service, but such service must be pre-approved by the school coordinator for students to gain credit. A-47. Service through religious organizations may be eligible for credit under the program so long as the service does not amount to what the school determines to be proselytizing. A-61-62.

Students set their work schedule and provide their own transportation, with training and supervision of the students provided by the organizations, not school personnel. A-48, A-56. At least half of the service must be performed outside the high school. A-47, A-54. Although the service is performed outside any particular classroom and outside the school itself, students must submit two documents to the school. A-48-49. First, the organization or agency for which the student performs the work must document the hours worked and the student must turn over these verified time sheets to the community service coordinator at the high school. A-47-48, A-52. Second, as part of the required senior year class, "Managing Your Future," students must complete a form stating where they performed their service, the type of work they did, and what they gained from the service. A-48-49, A-53.

Students who do not complete all aspects of the program are denied the opportunity to receive a high school diploma. A-46. The school district makes no provision for students and their parents who object to required service to opt out of the program. A-46-47.

Petitioner Daniel Immediato was a student at Rye Neck High School and was subject to the mandatory community service requirement. A-49. In addition to attending school, Daniel is a certified lifeguard and worked during summers and after school to contribute to his family's modest income. A-43. Daniel and his parents recognize the significance of families working together to help others. A-42-45. They also understand that for this work to be meaningful, it must be private and be motivated by a genuinely voluntary concern for others. *Id.* As such, Daniel Immediato objected to and refused to participate in the school district's program. A-50. Accordingly,

he was denied the opportunity to graduate from high school. A-46-47.

Daniel's parents, Diane and Eugene Immediato, also objected to their son's participation in the mandatory community service program. A-50. Like their son, the Immediatos strongly support charity but believe that the decision to serve others must be determined by the family and must stem from one's conscience and through self-motivation, not government edict. A-42-45. They steadfastly attempt to impart these values to their children. *Id.*

Because of the family's limited income, they could not afford to send Daniel to a private school. A-44. The only way Daniel Immediato had the opportunity to receive a high school diploma would have been if he participated in the mandatory community service program to which he and his parents so strenuously object. A-46-47.

B. Proceedings Below

Petitioners, the Immediato family, brought suit in the United States District Court for the Southern District of New York on April 19, 1994. They challenged the program under Fourteenth Amendment guarantees of due process of law and privacy, and the Thirteenth Amendment's prohibition of involuntary servitude.[1] The district court had jurisdiction under 42 U.S.C. § 1983; 28 U.S.C. §§ 2201 and 2202; and 28 U.S.C. § 1331.

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[1] The Immediatos limit this petition to Fourteenth Amendment parental and personal liberty guarantees.

After a period of limited discovery, the parties agreed that there were no disputed issues of material fact and filed cross-motions for summary judgment along with a Joint Statement of Material Facts. On January 19, 1995, the district court issued a memorandum and order granting respondents' motion and denying petitioners' motion.

In rejecting petitioners' claims, the district court held that (1) the program did not constitute involuntary servitude; (2) parental rights under the Fourteenth Amendment are non-fundamental and subject to rational basis review, under which the mandatory community service program passed muster; (3) the decision whether to perform charitable service was not recognized under the Fourteenth Amendment's personal liberty guarantee; and (4) the program did not violate Daniel's privacy rights in personal information. The district court entered final judgment on February 10, 1995.

Petitioners filed a timely notice of appeal to the United States Court of Appeals for the Second Circuit and, on January 2, 1996, the Court entered a judgment and opinion affirming the district court's judgment.

The Immediato family filed with the Second Circuit a Petition for Rehearing and Suggestion for Rehearing In Banc. The Court, on February 15, 1996, denied the petition and rejected the suggestion for rehearing in banc.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A TIMELY OPPORTUNITY FOR THIS COURT TO RESOLVE THE SPLITS IN JUDICIAL AUTHORITY AND THE AMBIGUITY IN THE LAW OVER THE PROPER APPLICATION OF FOURTEENTH AMENDMENT PARENTAL LIBERTY RIGHTS.

A. Overview

One of the most widely acknowledged and well-established rights at common law and at the founding of this country was the right of parents to have primary responsibility for the upbringing and education of their children. With the advent of compulsory education laws, parents surrendered some degree of authority over their children's education to the government. As courts recognized during the earlier part of this century, however, parental rights were not eviscerated in the public schools. Rather, an important balance was struck between parental and public school authority.

Today, this balance has been severely eroded. By compelling students to perform service to non-profit organizations and agencies, the school district in the instant case has taken a profoundly significant step beyond its traditional role.[2] It is not alone; a growing

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[2] Disputes over mandatory community service are likely to grow in coming years. Currently, it is estimated that approximately 8 percent of all public school districts have a mandatory service program, and other school districts are considering adopting service requirements. George Basler, *Volunteer Credit A Trend In Schools*, PRESS & SUN BULLETIN, December 14, 1994 (citing statistics provided by Learn & Serve

number of public schools – in the name of perceived societal needs – insist on taking over responsibilities that have until recently been left to parents. Tamara Henry, *Growing Debate Centers On Who Teaches Values*, USA TODAY, March 20, 1996; A-64-69. Moreover, public schools have begun to require activities, such as "mandatory volunteering," with little or no connection to the traditional school curriculum. Understandably, many parents are upset about these creeping intrusions into the family domain and have begun again demanding recognition of parental rights in the public schools. *Id.*

Amidst this increasing tension between public school and parental authority, the law surrounding Fourteenth Amendment parental liberty rights is ambiguous and conflicting. Although some recent decisions affirm the right of parents to direct their children's education as fundamental, other courts, including the Second Circuit in the instant case, characterize parental liberty as a non-fundamental right, leaving parents virtually powerless when governmental programs and regulations intrude into areas traditionally entrusted to family autonomy. This case presents a timely opportunity for this Court to resolve the uncertainty in the law and to restore much-needed balance between government prerogatives and parental rights.

Petitioners, Eugene and Diane Immediato, typify parents throughout the country concerned about increased

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America). Indeed, President Clinton in a recent speech urged all public middle and high schools to mandate volunteering as a graduation requirement. Susan Page, *Clinton: Let's Reward Community Service*, USA TODAY, March 10-12, 1996.

government intrusion into areas that had been left to family decision-making. The Immediatos believe that their family alone should determine whether and under what circumstances they and their children will perform charitable service to others. The parents support private charity and voluntary service to the community, but they believe that performing charity is a deeply personal matter that must remain between themselves and the recipients of their service, free from government oversight and coercion. *See* A-42-45 (Affidavit of the Immediato family).[3]

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[3] Keeping volunteering in the realm of individual initiative and personal conscience has deep roots in our heritage and in many religious teachings. *See, e.g.*, Alexis de Tocqueville, *Democracy in America* 287 (J.P. Mayer ed. 1969) (discussing America's grand tradition of voluntarism and private charitable efforts in creating "habits of the heart"); James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) (opposing all forms of mandatory tithing, whether it be to religious or educational institutions) (quoted in *Everson v. Board of Education of Ewing Twp.*, 330 U.S. 1, 35-37 (1947) (Rutledge, J., dissenting)); *see also Matthew* 6: 1, 3-4 (New King James Version) ("Take heed that you do not do charitable deeds before men, to be seen by them. . . . But when you do a charitable deed, do not let your left hand know what your right hand is doing, that your charitable deed may be in secret"); Ephraim E. Urbach, *The Sages: Their Concepts and Beliefs* (1987) (discussing importance of charity in Tannaim and Amoraim Jewish teachings); *The Koran*, S. iv. 114 ("if one exhorts to a deed of charity . . . [s]ecrecy is permissible, to him who does this seeking the good pleasure of God, we shall soon give a reward of the highest value"). Furthermore, the venerable institution of "anonymous" charitable giving is yet further evidence of the voluntary and private charitable spirit that flourishes so well in this country.

As the following sections set forth, recognition of parental liberty as a fundamental right strikes the proper balance between the state's interest in fulfilling educational goals and the ability of the Immediatos and all parents to direct their children's education. Petitioners respectfully ask this Court to resolve the ambiguity and conflicts in the law concerning parental rights; to reject the rational basis test as the appropriate standard; and to affirm as fundamental the right of parents to direct the upbringing and education of their children under the Fourteenth Amendment.

B. Since Meyer And Pierce Were Decided Before This Court's Modern Two-Tier Approach To Analyzing Constitutional Rights, Courts Are Uncertain And Have Split Over The Proper Level Of Scrutiny Applicable To Laws That Violate Parental Rights.

The right of parents to direct and control the upbringing and education of their children is firmly established in our constitutional heritage and guaranteed by the Fourteenth Amendment to the U.S. Constitution. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Farrington v. Tokushige*, 293 U.S. 284 (1927); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Carey v. Population Services*, 431 U.S. 678 (1977). As the Second Circuit recognized in its opinion, however, this Court has not addressed Fourteenth Amendment parental liberty rights in the educational context for decades, thus leading to ambiguity in the law and conflicts in federal and state courts. *See* A-13.

The First Circuit has also recently recognized the ambiguity in the *Meyer-Pierce* line of cases:

> The *Meyer* and *Pierce* cases were decided well before the current "right to privacy" jurisprudence was developed, and the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those rights whose infringement merits heightened scrutiny.

Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525, 533 (1st Cir. 1995), *cert. denied*, 116 S.Ct. 1044 (1996); *see also Blackwelder v. Safnauer*, 689 F. Supp. 106, 136 (N.D.N.Y. 1988) ("[t]he degree of judicial scrutiny to be applied to a governmental action that interferes with the privacy interests recognized in *Pierce* and *Meyer* . . . is not clear to this court"). Moreover, constitutional scholars also have acknowledged the uncertainty surrounding the nature of parental liberty rights. *See* Laurence H. Tribe, *American Constitutional Law* 1414-23 (2d ed. 1988); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 11.7 (4th ed. 1991) (contrasting various levels of scrutiny applied by this Court to parental liberty claims).

The lack of clear guidance concerning the nature of Fourteenth Amendment parental liberty rights has led to conflicts among courts. The Second Circuit's holding that parental liberty is a non-fundamental right directly conflicts with two recent, important cases concerning the rights of parents in the public school context. Last year, the Supreme Judicial Court of Massachusetts held that "parents possess a fundamental liberty interest, protected

by the Fourteenth Amendment, to be free from unnecessary intrusion in the rearing of their children." *Curtis v. School Committee of Falmouth*, 652 N.E.2d 580, 584-86 (1995), *cert. denied*, 116 S.Ct. 753 (1996) (recognizing parental liberty as a fundamental right but rejecting parental challenge to condom distribution program in the public schools); *accord Alfonzo v. Fernandez*, 606 N.Y.S.2d 259, 265-67 (1993), *appeal dismissed without op.*, 614 N.Y.S.2d 388 (1994) (striking down condom distribution program in the public schools on Fourteenth Amendment parental liberty grounds and recognizing parental liberty as a fundamental constitutional right). The courts in Massachusetts and New York based their conclusions on this Court's decisions in *Meyer*, *Pierce*, and *Prince*.[4]

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[4] The conflict in interpreting Fourteenth Amendment parental liberty rights is clearly evident in the rulings of other courts as well, and even among decisions of the same court. *Compare, e.g., Michigan v. Bennett*, 501 N.W.2d 106 (Mich. 1993) (finding the right to direct the education of children to be a non-fundamental right) with *Dep't of Social Services v. Emanuel Baptist Preschool*, 455 N.W.2d 1 (Mich. 1990) (Cavanagh, J.) (finding the right to direct the education of one's children to be fundamental) and *Sheridan Rd. Baptist Church v. Dep't of Ed.*, 396 N.W.2d 373 (1986) (Riley, J.) (same); compare *Jordan by Jordan v. Jackson*, 15 F.3d 333, 342 (4th Cir. 1994) (emphasis added) ("[t]here are few rights more *fundamental* in and to our society than those of parents to rear their children as they deem appropriate") with *Cornwell v. State Bd. of Educ.*, 428 F.2d 471, 472 (4th Cir. 1970), *aff'g*, 314 F. Supp. 340 (D. Md. 1969) (rejecting parental liberty as a fundamental right in challenge to sex education class); *see also Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988) (parental liberty is a non-fundamental right in the equal protection context); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 899 F. Supp. 1443 (M.D.N.C. 1995) (rejecting parental liberty as a fundamental right in mandatory

Faced with a conflicting legal landscape, the Second Circuit chose to characterize parental liberty rights as "non-fundamental" and subject to rational basis review.[5] Petitioners urge this Court to review this holding, resolve the ambiguity in the law, and affirm parental liberty as a fundamental constitutional right.

C. A Solid Basis In The Law Exists For Recognizing And Affirming Parental Liberty As A Fundamental Right.

Parental liberty rights have a rich constitutional pedigree, and a firm foundation exists in the law for acknowledging such rights as fundamental.[6] Despite the lack of recent cases addressing this issue, this Court has established parental liberty as "essential to the orderly pursuit of happiness by free men." *Meyer*, 262 U.S. at 399. Furthermore, parental liberty is a basic value "implicit in

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community service challenge); *Ohio v. Whisner*, 351 N.E.2d 750, 769 (Ohio 1976) (emphasis added) ("it has long been recognized that the right of a parent to guide the education . . . of his or her children is indeed a *'fundamental right'* guaranteed by the due process clause of the Fourteenth Amendment").

[5] Contrary to the Second Circuit's holding in the instant case (A-13-14), *Meyer* and *Pierce* do not stand for the proposition that parental rights are subject to rational basis review. Although both cases use the term "reasonable," they were decided over a decade before the U.S. Supreme Court established its current standards of review in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (setting forth modern "rational basis" review).

[6] *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Farrington v. Tokushige*, 293 U.S. 284 (1927); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

the concept of ordered liberty," thus meriting recognition of fundamental status. *See Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

Adding more authority for recognizing parental rights as fundamental, this Court has recently incorporated parental liberty rights – and *Meyer* and *Pierce* – into decisions involving other fundamental privacy rights recognized under the Fourteenth Amendment. *See, e.g., Griswold, id.* at 483 (incorporating "the principle of *Meyer* and *Pierce*"); *Ginsburg v. New York*, 390 U.S. 629, 639 (1968) (childrearing is "basic in the structure of our society"); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (stating that family rights and childrearing are fundamental rights); *Kelly v. Johnson*, 425 U.S. 238, 244 (1976) (equating *Meyer* parental liberty rights to those rights recognized in *Roe* and *Griswold*); *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 881 (1990) (equating "right of parents . . . to direct the education of their children" with "freedom of speech and of the press"); *Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833, 848 (1992) (most recent affirmation of parental liberty rights).[7] As one commentator recently noted:

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[7] While the recognition of non-textual rights is a treacherous area, all members of this Court agree that such rights exist. *See Casey*, 505 U.S. at 848-49, 951-52, 981 (plurality and dissenting opinions). The essential disagreement is whether a claimed right is consistent with, or antagonistic to, the recognized traditions, laws, and background principles underlying the Constitution and our republic as a whole. *See Bowers v. Hardwick*, 478 U.S. 186, 192-95 (1985). As discussed *supra*, the long-standing decisions of this Court and the background principles of common law that have sought to reconcile the needs of public education with parental rights and responsibilities, *see* note 8, indicate that parental rights, though

> Although the Supreme Court has not had the opportunity to declare parents' rights to guide the education of their children as fundamental under its current analysis, early Court decisions found such rights to be essential. Moreover, the Court has stated in dicta that the right is fundamental. . . . Thus, parents' right to guide the education of their children may be fundamental.

Daniel J. Rose (Note), *Compulsory Education and Parent Rights: A Judicial Framework of Analysis*, 30 Boston Col. L. Rev. 861, 863 (1989).

The right of parents to have primary responsibility over the education of their children was well established at common law. *See* Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. Rev. 606, 615 ("[t]he common law has long recognized parental rights as a key concept, not only for the specific purposes of domestic relations law, but as a fundamental assumption about the family as a basic social, economic, and political unit"); John Locke, *An Essay Concerning the True Original Extent and End of Civil Government*, ¶¶ 67, 69 (Great Books ed. 1991) (noting that parents may employ teachers but ultimate authority over children lies with parents). Both prior to and after the adoption of compulsory school attendance laws, courts also recognized that the common law right of parents to direct their children's education extended to having their children excused from certain

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non-textual, are encumbered with none of the difficulties that leave others highly controversial.

programs to which they objected within the public schools.[8]

With the advent of compulsory education, courts sought to balance the state's interest in education against parent's long-recognized common law right to direct their children's education, a balance sorely lacking in many modern public education decisions:

> The public school is one of the main bulwarks of our nation and we would not knowingly do anything to undermine it; but we should be careful to avoid putting our love of this noble institution to cause us to regard it as "all in all" and destroy the God-given and constitutional right of a parent to have some voice in the bringing up and education of his children. . . . [W]e want to be careful lest we carry the doctrine of government paternalism too far, for,

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[8] *See, e.g., Morrow v. Wood,* 35 Wis. 59 (1874) (child excused from required geography lessons due to parental objection); *Rulison v. Post,* 79 Ill. 567 (1875) (child excused from bookkeeping class); *School Board v. Thompson,* 103 P. 578 (Okla. 1909) (parent successfully objected to required singing lessons in the public schools); *Hobbs v. Germany,* 49 So. 515 (Miss. 1909) (child exempted from school requirement that homework be done at certain times); *State v. Ferguson,* 144 N.W. 1039 (Neb. 1914) (successful parental objection to music class); *Hardwick v. Board of School Trustees,* 205 P. 49 (Cal. App. 1921) (student exempted from dancing instruction on parental objection); *People ex rel. Vollmar v. Stanley,* 255 P. 610 (Colo. 1927) (child excused from study of biology); *see also* Mary-Michelle Upson Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused From Objectionable Instruction?,* 50 Southern Cal. L. Rev. 871, 886-97 (1977) (hereinafter "Hirschoff"); Joel S. Moskowitz, *Parental Rights and State Education,* 50 Wash. L. Rev. 623, 636-43 (1975).

> after all is said and done, the prime factor in our scheme of government is the American home. . . . [School authorities] should not too jealously guard or attempt to defend their supposed prerogatives.

Ferguson, 144 N.W. at 1043-44; *see also Stanley* 255 P. 613-14 (emphasis added) ("the right of parents to select, *within limits*, what their children shall learn is one of the liberties guaranteed by the Fourteenth Amendment to the national Constitution"). Although parental rights were considered paramount, common law decisions established two important limits on parental rights in the public schools. First, students could not be exempted from classes deemed the "essentials of good citizenship." Hirschoff at 886. Furthermore, parents could not exercise their rights in a manner that adversely affected the rights of other parents and students. *Id.*[9]

Early common law cases recognizing and enforcing the right of parents to direct their children's education, including the right of parents to have some degree of authority while their children attended public schools, were the basis for the landmark *Meyer*, *Pierce*, and *Farrington* decisions. *See* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Societal Interests*, 81 Mich. L. Rev. 473, 572 (1983) ("[w]hen the Court in 1923 first recognized that the right of parents to direct the upbringing of their children was part of the substantive liberty protected by

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[9] As Part E of this section of the petition sets forth, these common law rules provide an appropriate framework to resolve current disputes between public school districts and parents seeking to direct their children's education.

the due process clause, it did not create a new legal right out of whole cloth. It merely acknowledged in constitutional language the traditions . . . that predated the Constitution"); *see also* Hirschoff at 897.

In addition to respecting parental rights in the public school setting, the common law also explicitly recognized that parental liberty is worthy of fundamental status because it represents protection of an institution of the utmost importance to our society: the family.[10] As this Court has stated, "the sanctity of the family . . . is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (Powell, J.).

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[10] While the First Amendment protects the right of individuals, including parents, to freely exercise their religious beliefs, the Fourteenth Amendment protects the autonomy of the family and guarantees the right of all parents to direct their children's education including such matters as "the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Curtis*, 652 N.E.2d at 585 (*citing Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972)). The Second Circuit mistakenly relied on another passage *Yoder*, 406 U.S. at 215-16, for its contention that non-religious objections to the public school curriculum receive rational basis review. *See* A-14. The *Yoder* decision was primarily a free exercise case that mentioned Fourteenth Amendment parental liberty rights in the context of guiding children's *religious* upbringing. Ronald D. Rotunda, John E. Nowak, & J. Nelson Young, *Treatise on Constitutional Law: Substance and Procedure* § 21.8 n.9 (1991 ed.). The passages from *Yoder* relied on by the Second Circuit in its decision merely reinforce the requirement that free exercise claims must be religiously based in order to receive the protection of the First Amendment. They do not address in any way Fourteenth Amendment parental liberty rights.

Accordingly, the right of parents to direct the upbringing and education of their children should likewise be affirmed as fundamental.[11]

D. Rational Basis Review Will Leave Parental Rights Unprotected.

Classification of Fourteenth Amendment parental liberty rights as non-fundamental and adoption of rational basis review for parental liberty claims would render virtually every current or future public school program or educational statute immune from challenge. Under rational basis review, a government law or program must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis" for the law. *F.C.C. v. Beach Communications, Inc.*, 113 S.Ct. 2096, 2101 (1993). In reality, such review "is tantamount to no review at all." *Id.* at 2106 n.3 (Stevens, J., concurring); *see also* John E. Nowak & Ronald D. Rotunda, *Constitutional Law*

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[11] This Court must not disregard the principled classification of Fourteenth Amendment parental liberty rights as fundamental. The consequence of this indifference to the history and principles of this Nation would be to invite the wholesale and effectively unreviewable displacement of parental direction in the education of children. In clarifying how this tradition is to be reconciled with intrusive public school programs, this Court ought not depart from this tradition. However, any departure should at least recognize that public school programs that implicate parental rights ought to be subject to heightened examination of the parental and state interests themselves. As discussed *supra*, adoption of rational basis review would make public school programs virtually unreviewable and entirely undermine the ability of parents to direct their children's education.

§§ 11.4, 14.3 (4th ed. 1991) (discussing extremely lax rational basis review standard).

Any public school requirement, no matter how onerous and invasive of parental rights and prerogatives, could be justified as furthering some "rational" educational objective. For the purpose of "educating them," students could be required to participate in political street demonstrations, violent sports activities, dissections of animals, graphic sexual demonstrations, etc., and parents would be left without recourse. Under rational basis review, there really are no limits on what could be required of students in the name of education.[12]

The constitutionality of public school programs or educational statutes should not be sustained merely by asserting valid or "rational" educational interests and declaring that the program furthers those interests, for such a non-standard drains parental liberty rights of all vitality in the public school context. This view clashes with both the decisions of this Court and our nation's recognition of the primary role of the family and parents in the upbringing and education of children. Accordingly, this Court should reject rational basis review as the appropriate standard when state authority violates parental rights.

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[12] Indeed, the requirements struck down in *Meyer* and *Pierce* were justified on the basis of furthering such valid educational purposes as promoting good citizenship values, and most likely would have been upheld if subject to modern rational basis review. *See Meyer*, 262 U.S. at 398; *Pierce*, 268 U.S. at 517.

E. Affirming Parental Rights As Fundamental Strikes The Proper Balance Between Constitutional Rights And Public School Autonomy.

If parental rights were affirmed as fundamental, then public school programs that burdened those rights would be subject to strict scrutiny. However, this Court has indicated that school board decisions concerning the curriculum of a public school are generally accorded deference. *See, e.g., Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 863 (1982).[13] Therefore, in addition to establishing certain boundaries to public school prerogatives, it is important to set certain limits on parental liberty claims in the public school setting in order to strike a proper and constitutionally

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[13] The normal deference afforded the traditional school curriculum, however, should not extend to functions or requirements that take place outside of the classroom and especially activities outside the school itself, a time when minors are under the exclusive authority of their parents. In the instant case, the required community service cannot strictly be characterized as part of "the curriculum." Although the service is ostensibly a part of the required senior year class, "Managing Your Future," students do not perform the service while in class. A-47, A-56. Half of the service can be performed during free periods in the school day, but the remaining hours must be performed outside the school itself. *Id.* Furthermore, unlike other school requirements, school officials do not supervise any of the service. A-48. Even this Court recognized in another context that community service could not be characterized as part of the traditional public school curriculum. *See Board of Educ. of Westside Com. Schools v. Mergens*, 496 U.S. 226, 240 (1990) (community service club considered "non-curriculum student group").

mandated balance between public school and parental authority.

As set forth previously, common law cases recognized that parents could not exempt their children from public school programs deemed the "essentials of good citizenship" nor could they exercise their rights in a manner that was disruptive to the administration of the schools. These important limiting principles should still set the respective boundaries for parental rights and the power of public schools today.

In addition to these common law requirements and before courts would even apply strict scrutiny, parents would also have to demonstrate that a particular public school program was "coercive," and thereby a violation of their right to direct their children's education. The Supreme Judicial Court of Massachusetts in *Curtis*, 652 N.E.2d at 586, held that "[c]oercion exists where the governmental action is mandatory and provides no outlet for parents, such as where refusal to participate in a program results in a sanction or in expulsion."

In the instant case, students will not receive a high school diploma under any circumstances unless they perform the service. Unlike many school requirements, there is no alternative assignment, opt-out provision, or means of gaining credit without having to perform actual service to others. The school district's mandatory community service program is therefore unquestionably coercive.

In the court below, petitioners suggested another limiting factor on parental liberty claims in the public schools – the "exposure/action" rule. Under this threshold requirement for stating a parental liberty claim in the

public schools, parents must demonstrate that their children are required to perform actions contrary to their parents' values, as opposed to merely being exposed to objectionable values and beliefs. Public schools could expand their curricula into areas traditionally left to family decision-making, so long as the schools do not force students to perform acts consistent with school officials' beliefs but contrary to parental values. This line of demarcation is especially apt where the compelled actions take place outside of school and have little or no connection to the traditional public school curriculum.[14]

For instance, public schools can teach such values as thrift, good work habits, democratic participation, abstinence – or community service. But decisions about whether to actually save money, obtain employment, vote in elections, engage in sexual activity, or perform service to others are entrusted by the Constitution to individual and family decision-making.

The *Curtis* court employed a rule similar to the exposure/action rule suggested by petitioners. While recognizing parental liberty rights as fundamental, the court held that the condom distribution program did not violate those rights:

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[14] The basis for petitioners' suggested rule can be found in *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1064-65 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) (rejecting challenge by parents to reading program in the public schools), and early common law cases preserving parental rights in the public school setting. For instance, the *Mozert* court distinguished between reading and classroom discussions (which were constitutionally acceptable) and true "acts," such as role play (which were not).

> No classroom participation is required of students. The students are not required to seek out and accept the condoms, read the literature accompanying them, or participate in counseling regarding their use. In other words, the students are free to decline to participate in the program. . . . [Moreover,] mere exposure to programs at school does not amount to unconstitutional interference with parental liberties without the existence of some compulsory aspect to the program.

Id. at 586.[15] Applying this rule to compulsory actions in the public schools would serve an important limiting function, allowing public school officials broad discretion to determine their curricula, while still preserving parental rights.

Lastly, it is vitally important to stress the relief sought by petitioners and other parents pursuing parental liberty claims. Parents seek only to opt out of certain objectionable programs required by the public schools. Public schools would still have vast discretion to determine their curriculum, to experiment, and to teach whatever values they choose, while parents would have the ability to exempt their children from certain programs that require actions that have traditionally been left to family decision-making.

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[15] In direct contrast to the public school program at issue in *Curtis*, the school district in the instant case requires Daniel Immediato to participate in the mandatory community service program and perform acts that have traditionally been left to family decision-making.

Most importantly, parents could not dictate to the schools what other children should learn or prevent the school district from offering certain courses, or teaching sensitive matters to young people. Far from destroying public school harmony, allowing parents to have some modicum of control over the content of their children's education goes a long way toward resolving values controversies currently erupting in school districts throughout the country.

In the instant matter, the Immediatos do not seek to dictate what their child or any others are taught in the schools. They are not trying to prevent in any way the ability of public schools to expose the value of community service to their child, assign paper topics, take field trips, test his knowledge of community service opportunities, or offer voluntary service programs. They only wish to prevent the school district from forcing their child to perform acts that the traditions of our Nation demand must be undertaken subject only to family decision-making. Recognizing parental liberty as a fundamental constitutional right serves both the school district's interest in promoting educational values and preserves the ability of the Immediatos – and all parents – to have some degree of control over their children's education.

II. THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO REAFFIRM THE COMMON LAW RULE THAT GOVERNMENTS CANNOT IMPOSE A LEGAL DUTY ON INDIVIDUALS TO SERVE OTHERS, AND THAT CHARITABLE WORK MUST BE LEFT TO INDIVIDUAL CONSCIENCE AND BELIEF.

Fundamental rights are those personal freedoms "implicit in the concept of ordered liberty,"[16] or "deeply rooted in this Nation's history and traditions."[17] One would be hard pressed to find a principle and freedom more deeply rooted in this Nation's history and traditions than that of individuals deciding for themselves whether and under what circumstances to perform acts of charity. Over 150 years ago, Alexis de Tocqueville marveled at how American volunteers and private associations performed functions that in other countries were assumed by the government.[18] De Tocqueville contrasted these "civil" institutions with political bodies, a sphere of society not suited for nurturing what he described as "habits of the heart." *Id.*[19]

The school district in this case has taken the civil institution of voluntary charity and turned it into a public high school graduation requirement; self-motivation and inspiration are now replaced by compulsion. The school

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[16] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled on other grounds, Benton v. Maryland*, 395 U.S. 784 (1969).

[17] *Moore v. City of East Cleveland*, 431 U.S. at 503.

[18] *See* de Tocqueville, *supra*, note 3.

[19] *See also* note 3, *supra* (discussing this country's tradition of private charity and voluntarism in serving others).

district's program clashes with the centuries-old tradition that the decision to provide charitable service to others – to volunteer – must come from an individual's conscience, not from a state-imposed obligation. That is why the colloquial expression for the school district's program – "mandatory volunteering" – strikes one as so strange, so oxymoronic.

Petitioners urge this Court to recognize that within the range of personal freedoms protected by the Fourteenth Amendment must be the right to determine whether an individual wishes to perform charitable service to others. The Second Circuit noted the fact (readily admitted by petitioners) that no court or case has directly addressed whether under the Constitution individuals can be compelled by government to perform charitable service. *See* A-18. A very good reason exists for the lack of case law on this issue: until the imposition of mandatory community service requirements, governments had never imposed such duties on individuals.[20]

Not only is the school district's "mandatory volunteering" program diametrically opposed to this Nation's history of voluntarism, it also flies in the face of the long-established common law principle of refusing to transform what many would consider a moral duty (service to

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[20] Requiring public high school students to perform service to others has no historical or common law antecedent and is of recent origin. The move toward mandating community service as a public high school graduation requirement arose mostly in the late 1980s and was largely spurred by a policy group advocating mandatory service. *See* Ernest L. Boyer, *High School: A Report on Secondary Education* (1983).

others) into a legal requirement. The common law "has always refused to transmute moral duties into legal duties." Charles O. Gregory, "The Good Samaritan and the Bad: The Anglo-American Law," in *The Good Samaritan and the Law* 23 (J. Ratcliffe, ed. 1966). Indeed, noted common law scholar Francis H. Bohlen concluded that "there is no distinction more deeply rooted in the common law and more fundamental than that between . . . active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others." Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. Penn. L. Rev. 217, 219 (1908).

In direct contrast to the school district's program of required service to others, the common law "does not compel active benevolence between man and man. It is left to one's conscience whether he shall be a Good Samaritan or not." James Barr Adams, *Law and Morals*, 22 Harv. L. Rev. 97, 112 (1908). Moreover, "[t]he laissez-faire approach of the common law restrained men from committing acts of affirmative harm but did not make the government an agency for forcing men to help each other." Harold F. McNiece & John V. Thornton, *Affirmative Duties in Tort*, 58 Yale L. J. 1272, 1288 (1949).

In surveying Anglo-American legal doctrine, Bohlen also concluded that "no support can be derived from it for the contention that the law has recognized as a legal duty the moral, ethical, and humanitarian obligation to aid the unfortunate." Bohlen, *id.* The school district's program, however, in contravention of this legal tradition, obligates students to undertake the "direct provision of a basic human service to a person or people in need

without remuneration." *See* A-56. By requiring individuals to perform service to others, the school district violates a fundamental tenet of Anglo-American law concerning the legal obligations individuals owe to others.

Consequently, petitioners do not seek creation of a new constitutional right, but merely seek recognition of a privilege "long recognized at common law as essential to the orderly pursuit of happiness by free men." *See Meyer* 262 U.S. at 399; *Ingraham v. Wright*, 430 U.S. 651, 672-73 (1977) ("[t]he Due Process Clause . . . was intended to give Americans at least the protection against governmental power that they had long enjoyed as Englishmen against the power of the Crown"); *Michael H. v. Gerald D.*, 491 U.S. 110, 121-25 (1989) (exploring common law to determine substantive due process guarantees).[21]

The decision to serve others was left to individual decision-making at common law and throughout our Nation's history, and is one of the foundations of a free, civil, and voluntary society; it should be protected under the Constitution. Accordingly, petitioners respectfully ask this Court to recognize that the decision to serve others – a long standing privilege usurped by the school district in this case – is entrusted by the Fourteenth Amendment's

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[21] Significantly, this Court has examined common law guarantees to determine the extent of protections afforded public school students. In *Ingraham*, 430 U.S. at 660-63, for instance, this Court rejected constitutional restraints on corporal punishment in the public schools because the common law both permitted such punishment and provided remedies to students when the punishment was excessive.

personal liberty guarantee to the realm of individual decision-making.

CONCLUSION

This Court has declared that the very purpose of the Constitution is "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The instant case is an example of a public school district simply going too far, compelling actions that under the common law and the U.S. Constitution must be entrusted to individual conscience and family decision-making. Petitioners respectfully urge that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,

LANCE J. GOTKO
875 Third Avenue
8th Floor
New York, NY 10022
(212) 833-1115

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
CLINT BOLICK
*SCOTT G. BULLOCK
1001 Pennsylvania Avenue NW
Suite 200 South
Washington, DC 20004
(202) 457-4240

Counsel for Petitioners

*Counsel of Record

Date: May 15, 1996

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 189 August Term, 1995

(Argued: October 10, 1995 Decided: JAN -2 1996)

Docket No. 95-7237

DANIEL IMMEDIATO, DIANE IMMEDIATO, and EUGENE IMMEDIATO,

Plaintiffs-Appellants,

MARIO GIRONDA, JR., MARIO GIRONDA, and SANDRA GIRONDA,

Plaintiffs,

- v. -

RYE NECK SCHOOL DISTRICT, KATHLEEN D. GULOTTA, FRANK SPEDAFINO, BEATRICE CERASOLI, ALAN MANOCHERIN, JANICE K. ANDERSON, LIZ PERELSTEIN, PETER J. MUSTICH,

Defendants-Appellees.

Before: NEWMAN, *Chief Judge*, McLAUGHLIN and LEVAL, *Circuit Judges*.

A high school student and his parents sued their local school district and its officials, alleging that the district's mandatory community service program violated their constitutional rights. The United States District Court for the Southern District of New York (Brieant, *J.*) granted the defendants' motion for summary judgment,

holding that the program did not violate either the Thirteenth or Fourteenth Amendment.

AFFIRMED.

SCOTT G. BULLOCK, Institute for Justice, Washington, DC (William H. Mellor III, Clint Bolick, Institute for Justice, Washington, DC; Lance J. Gotko, New York, NY, of counsel), *for Plaintiffs-Appellants.*

PHYLLIS S. JAFFE, Plunkett & Jaffe, White Plains, NY, *for Defendants-Appellees.*

(Thomas A. Bowden, Baltimore, MD; Robert S. Getman, New York, NY, submitted a brief for *amicus curiae* The Association for Objective Law.)

(James F. Bendernagel, Dennis D. Hirsch, Anne K. Adams, Michael J. Raphael, Sidley & Austin, Washington, DC; Robert Teir, The American Alliance for Rights and Responsibilities, submitted a brief for *amicus curiae* The American Alliance for Rights and Responsibilities.)

McLAUGHLIN, *Circuit Judge*:

Daniel Immediato is a high school student in the Rye Neck (N.Y.) School District (the "District"). He and his parents (together, the "plaintiffs") brought an action pursuant to 42 U.S.C. § 1983 against the District, the members of the District Board of Education, and the District Superintendent (together, the "defendants"), in the

United States District Court for the Southern District of New York (Charles L. Brieant, Jr., *Judge*), alleging that the District's mandatory community service program (the "program") violated their constitutional rights. The plaintiffs argued that the mandatory community service program violated: (1) Daniel's Thirteenth Amendment rights; (2) the parents' Fourteenth Amendment rights; and (3) Daniel's Fourteenth Amendment rights. The plaintiffs requested declaratory and injunctive relief. The district court granted summary judgment for the defendants.

Plaintiffs now appeal, renewing the arguments raised below. We hold that the District's mandatory community service program does not violate the plaintiffs' constitutional rights, and thus affirm the judgment of the district court.

BACKGROUND

Rye Neck School District's public high school, located in Mamaroneck, New York, has an enrollment of about 275 students in grades 9-12. In 1990, the District instituted a mandatory community service program as part of the high school curriculum. Under the program, in order to earn their diplomas all students must complete forty hours of community service sometime during their four high-school years. They must also participate in a corresponding classroom discussion about their service. The program has no exceptions or "opt-out" provisions for students who object to performing community service.

There are rules regarding the organizations to which the students may donate their services, and the nature of the work they may perform. For their efforts to count

towards the forty-hour requirement, students may not receive pay for their services, nor may their services displace activities performed by paid employees of the organization being served. Furthermore, while up to twenty hours of service may be provided to the school itself or to younger students at the school, at least twenty hours must be provided to an organization outside the school.

Within the boundaries of these rules, the students have a large degree of latitude to choose their organizations. Students, for example, may work for not-for-profit corporations, charities, political organizations or public agencies. Although the school furnishes an extensive list of suggested organizations and of groups that have asked for student help, students remain free to suggest their own charitable organizations. Student proposals must win the approval of the school, but approval is almost always granted. To the best recollection of school officials, only two students have ever been told that their proposed service was ineligible for credit: (1) a student who wanted to work in his father's store; and (2) a student who was to be paid for babysitting.

Students may also provide their services to religiously-affiliated institutions, so long as the students' work involves charitable assistance, and not merely promotion of the religion or organization. For example, students may assist a church in feeding or housing the homeless, but will not receive credit for proselytizing.

The organizations for which the students work are responsible for any necessary training or supervision. The organizations must document the hours worked by

the students, and the students must submit this verified time sheet to the school. Students may perform their forty hours of service at any time over their four high school years, including the summers when school is not in session. Students set their own work schedules and provide their own transportation.

As part of a required senior-year course ("Managing Your Future"), students must complete a short form documenting and summarizing their community service. Listing where, when, and how they performed their service, students must also state what they "gained" from their experience and whether their service had any "career connection" for them. The form does not ask why they chose the particular organization or whether they agreed with its goals. After completing the form, the students discuss their service with the teacher and other students. This discussion is limited to the information on the form. The program is graded on a pass-fail basis, and students are required to meet certain benchmarks (e.g., 10 hours) by the end of each quarter of their senior year to pass.

Daniel Immediato, a student at the District's high school, objects to the mandatory community service program. He believes that charitable activities and community service, while admirable, must be left to an individual's conscience, and should not be mandated by the school. He also desires to keep private any information about what community service he does or does not perform. Daniel's parents, co-plaintiffs, concede that community service is rewarding, but maintain that it must remain a matter of individual choice. They have tried to instill these values in Daniel, but fear that the

school's mandatory community service program will instead teach him that guidance on moral issues should come from the government, rather than from within.

Daniel and his parents filed a complaint against the District and several of its officers. They contend that the mandatory community service program conditions the right to public education on the surrender of their constitutional rights. Specifically, they assert that the program: (1) imposes involuntary servitude upon Daniel, in violation of the Thirteenth Amendment; (2) infringes on Daniel's parents' Fourteenth Amendment right to direct his upbringing and education; (3) infringes on Daniel's personal liberty, in violation of the Fourteenth Amendment; and (4) violates Daniel's right to privacy, in violation of the Fourteenth Amendment. The plaintiffs asked the district court to declare the program unconstitutional, and to permanently enjoin the defendants from imposing the program. The defendants denied that the program violated any of the plaintiffs' constitutional rights, and argued that, in any event, the district court should abstain from hearing the case under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (a federal court should abstain from hearing complex state-law questions bearing on substantial policy issues).

After limited discovery, the parties agreed that there were no disputed issues of material fact, and submitted a Joint Statement of Material Facts. The parties also filed motions for summary judgment. On January 19, 1995, the district court issued a thorough memorandum and order granting summary judgment for the defendants, and denying the plaintiffs' similar motion. *Immediato v. Rye Neck School District*, 873 F. Supp. 846 (S.D.N.Y. 1995). The

court held that *Burford* abstention was inappropriate, and went on to find that the program violated neither Daniel's nor his parents' constitutional rights. Plaintiffs now appeal, renewing the same four constitutional challenges. The District does not challenge the court's failure to abstain, so the *Burford* question is not before us.

DISCUSSION

We review a grant of summary judgment *de novo*. *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 967 F.2d 742, 746 (2d Cir. 1992); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

I. Thirteenth Amendment

Plaintiffs argue that, because the mandatory community service program "requires students to serve others" or forfeit a high school diploma, the program constitutes involuntary servitude. We disagree.

The Thirteenth Amendment provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

U.S. Const., amend. XIII, § 1. The dispositive question, then, is whether the mandatory community service program rises to the level of "involuntary servitude" contemplated by the amendment.

The Supreme Court has conceded that, "[w]hile the general spirit of the phrase 'involuntary servitude' is easily comprehended, the exact range of conditions it prohibits is harder to define." *United States v. Kozminski*, 487 U.S. 931, 942 (1988). The Supreme Court has observed, however, that "the phrase 'involuntary servitude' was intended 'to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results.' " *Id.* (quoting *Butler v. Perry*, 240 U.S. 328, 332 (1916)); *see also United States v. Shackney*, 333 F.2d 475, 485 (2d Cir. 1964). We have added that the ban on involuntary servitude "was to abolish all practices whereby subjection having some of the incidents of slavery was legally enforced. . . . " *Shackney*, 333 F.2d at 485.

In application, courts have consistently found the involuntary servitude standard is not so rigorous as to prohibit all forms of labor that one person is compelled to perform for the benefit of another. The Thirteenth Amendment does not bar labor that an individual may, at least in some sense, choose not to perform, even where the consequences of that choice are "exceedingly bad." *Id.* at 486; *see also Watson v. Graves*, 909 F.2d 1549, 1552 (5th Cir. 1990). For example, a state may require an attorney to work *pro bono*, *United States v. 30.64 Acres of Land*, 795 F.2d 796, 800-01 (9th Cir. 1986) (attorney may, in the alternative, choose not to practice law), or a doctor who has accepted scholarship funds to perform *pro bono* services, *United States v. Redovan*, 656 F. Supp. 121, 128-29 (E.D. Pa. 1986), *aff'd*, 826 F.2d 1057 (3d Cir. 1987) (doctor may choose to pay damages for breach of contract). The government may also require the performance of "civic

duties" such as military service, *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918), jury duty, *see Hurtado v. United States*, 410 U.S. 578, 589 n.11 (1973), and upkeep of local public roads, *Butler*, 240 U.S. at 333, without trenching upon the Thirteenth Amendment.

In *Jobson v. Henne*, 355 F.2d 129, 132 (2d Cir. 1966), we suggested that the constitutionality of forced labor turns, in large measure, on the nature and amount of the work demanded, and the purpose for which it is required. Thus, while the Thirteenth Amendment does not foreclose the ability of the state to require chores of its institutionalized mental patients, we have recognized that "there may be some mandatory programs so ruthless in the amount of work demanded, and in the conditions under which the work must be performed, and thus so devoid of therapeutic purpose, that a court justifiably could conclude that the [work constituted] . . . involuntary servitude." *Id.*

Like so many thorny legal distinctions, it is all a matter of degree. Guided by the Supreme Court in *Butler* and *Kozminski*, our own decisions in *Shackney*[1] and *Jobson*, and the import of the other cases mentioned above, we join the Third Circuit in finding that the appropriate analysis under the Thirteenth Amendment is a "contextual approach," *Steirer v. Bethlehem Area School Dist.*, 987

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[1] We do not believe that any of the conclusions reached in *Shackney*, which relied in part on *Hodges v. United States*, 203 U.S. 1 (1906), have been altered by the substantial overruling of *Hodges* in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 n. 78 (1968).

F.2d 989, 1000 (3d Cir. 1993), examining the challenged labor through a wider constitutional prism.

Plaintiffs urge us to ignore context and to focus instead upon the "plain meaning" of the amendment. They argue that, because the organization for which Daniel volunteers will receive a tangible benefit, his work is, almost by definition, "servitude." And they note that, because service is forced upon Daniel under the threat of withholding his high school diploma, the service is "involuntary." Therefore, the plaintiffs assert, the program falls within the plain meaning of "involuntary servitude."

Matters are rarely that simple. A search for the plain meaning of the constitutional text does not require – and, indeed, often cannot support – such clinical lexical dissection. Rather, the inquiry must be whether, "taking as a whole the set of conditions existing in the imposition of a mandatory community service program in a public high school, the students providing the services are in a condition of involuntary servitude," *Steirer*, 987 F.2d at 998, as that singular phrase is understood in its historical context.

Taking a contextual approach, we have no trouble concluding that the mandatory community service program does not amount to involuntary servitude in the constitutional sense. The work required is not severe: students must perform only forty hours of service in four years. Furthermore, the nature of the work required and conditions under which it must be performed are hardly onerous. Students may choose among a nearly infinite variety of organizations offering a kaleidoscope of service

activities. They are free to arrange their own work schedules, and to work in the summers when other school-related duties are minimal.

It is important to note that the purpose of the program is not exploitative. Rather, it is educational, particularly when coupled with the related classroom discussions. Finally, the level of coercion is not so high as to compel a finding of involuntary servitude. Although students who forego their required service will not graduate, they may avoid the program and its penalties by attending private school, transferring to another public high school, or studying at home to achieve a high school equivalency certificate. While these choices may be economically or psychologically painful, choices they are, nonetheless. They might not render the program voluntary, but they contribute to the conclusion that it is not involuntary servitude.

Considering all these factors, we find that the program is not constitutionally infirm. That is not to say that any and every service program that a public school district may devise would survive constitutional scrutiny. If, for instance, the students were required to spend their Saturdays at the homes of their teachers, washing their cars, painting their houses, and weeding their gardens, the extent, nature, and conditions of "service," and the more obviously exploitative purpose of the program, might indeed warrant a finding of "involuntary servitude." But this is not our case.

Because we conclude that the mandatory community service program is not, on the whole, "compulsory labor" which, "in practical operation" produces "undesirable

results" analogous to slavery, *Kozminski*, 487 U.S. at 942, we hold that the District's mandatory community service program does not constitute impermissible involuntary servitude.

II. Fourteenth Amendment

Plaintiffs also argue that the program violates both Daniel's and his parents' rights under the Due Process Clause of the Fourteenth Amendment. Again, we disagree.

Our analysis begins with the proposition that the Due Process Clause of the Fourteenth Amendment embodies a substantive component that protects against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). This "substantive due process," as it has come to be known, however, does not stand as a bar to all governmental regulations that may in some sense implicate a plaintiff's "liberty." Rather, the level of scrutiny with which we will examine a governmental regulation turns on the nature of the right at issue.

When the right infringed is "fundamental," the governmental regulation must be "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, ___ U.S. ___, 113 S.Ct. 1439, 1447 (1993). Rights are fundamental when they are "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), or "deeply rooted in this Nation's history and tradition." *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); *see also Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986); John E. Nowak, Ronald D. Rotunda, *Constitutional Law* § 11.4, at 374 (4th

ed. 1991). Where the claimed right is not fundamental, the governmental regulation need only be reasonably related to a legitimate state objective. *Flores*, 113 S.Ct. at 1448-49; *Bowers*, 478 U.S. at 196.

A. Parental Rights

Plaintiffs argue for a "constitutional right of parents to have primary responsibility over the upbringing and education of their children," and they contend that such a right is sufficiently basic and traditional to warrant strict scrutiny. From these two propositions plaintiffs ask us to conclude that parents have a fundamental constitutional right to exempt their children from educational requirements to which they object on secular grounds. We appraise this request with humility and caution, as "judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Flores*, 113 S.Ct. at 1447.

Parents, of course, have a liberty interest, properly cognizable under the Fourteenth Amendment, in the upbringing of their children. *See Runyon v. McCrary*, 427 U.S. 160, 176 (1976); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). The Supreme Court, however, has never expressly indicated whether this "parental right," when properly invoked against a state regulation, is fundamental, deserving strict scrutiny, or earns only a rational basis review. Our reading of the appropriate caselaw convinces us that rational basis review is appropriate.

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court faced a challenge to a state law forbidding schools from teaching foreign languages to students below the

eighth grade. The Court held the law unconstitutional as applied, stating that it was "arbitrary and without *reasonable relation* to any end within the competency of the State." *Id.* at 403 (emphasis added). Similarly, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court struck down a state law requiring parents to send their children aged 8-16 to public school only (and making it a misdemeanor to send them to private school). The Court, tracking its language from *Meyer*, found that the statute had "no *reasonable relation* to some purpose within the competency of the State." *Id.* at 535 (emphasis added).

More recently, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), Amish plaintiffs argued that mandatory school attendance beyond the eighth grade violated their rights under the First Amendment's Religion Clauses. Finding for the plaintiffs' the Court was careful to focus upon the religious nature of their claims, observing in contrast that "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to *reasonable* state regulation of education if it is based on purely secular considerations." *Id.* at 215 (emphasis added). Thus, while parents have definite rights over their children's education, "they have no constitutional right to provide their children with . . . education unfettered by *reasonable* government regulation." *Runyon*, 427 U.S. at 178 (emphasis added).

Reviewing these cases and others, we have observed that "[t]here is a long line of precedents indicating that the government may not *unreasonably* interfere with . . . [the right to] raise one's children as one wishes." *Black v. Beame*, 550 F.2d 815, 816 (2d Cir. 1977) (emphasis added). Other circuits, analyzing state-imposed educational requirements, have expressly applied the rational

basis standard when reviewing a parent's claimed right to control the upbringing of their child. *See Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988); *Cornwell v. State Board of Educ.*, 428 F.2d 471 (4th Cir.) (adopting *per curiam* the full opinion in *Cornwell v. State Board of Educ.*, 314 F. Supp. 340 (D. Md. 1969)), *cert. denied*, 400 U.S. 942 (1970).

We thus conclude that where, as here, parents seek for secular reasons to exempt their child from an educational requirement and the basis is a claimed right to direct the "upbringing" of their child, rational basis review applies. We are aware that Daniel's parents object because of their "values" or "morals," as opposed to a general objection to the educational wisdom of the program, but we do not find this difference to be of constitutional significance. While the Constitution does indeed distinguish between religious objections and secular objections, *see* U.S. Const., amend. I; *Yoder*, 406 U.S. at 215-19, it makes no similar distinctions among purely *secular* objections based on values, morals, or other firmly-held beliefs.

Furthermore, we do not share plaintiffs' belief that the standard of review should be ratcheted up because the program forces students to "act" in contravention of their parents' values, as opposed to simply exposing the students to information that conflicts on an intellectual plane with those values. First, this "exposure/action" distinction is somewhat chimerical, particularly in the educational context. In the course of education, schools often require more than a passive glance at a book. Indeed, "for the things we have to learn before we can do them, we learn by doing them." Aristotle, *Nicomachean Ethics*, bk. II, ch. 1. Second, any distinction that can be

drawn between exposure and action should properly bear on whether the regulation meets the appropriate standard of review, and not on what that standard of review should be. It may be that, in certain circumstances, exposing students to ideas in the name of education is rational, while requiring them to act on those ideas is not.

The District's mandatory community service program easily meets the rational basis test. Education is unquestionably a legitimate state interest. *See Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) ("education is perhaps the most important function of state and local governments"); *Ambach v. Norwick*, 441 U.S. 68, 80 (1979). Indeed, the Supreme Court has indicated that the state has a "compelling" interest in educating its youth, to prepare them both "to participate effectively and intelligently in our open political system," and "to be self-reliant and self-sufficient participants in society." *Yoder*, 406 U.S. at 221. The state's interest in education extends to teaching students the values and habits of good citizenship, and introducing them to their social responsibilities as citizens. *See Norwick*, 441 U.S. at 80.

Furthermore, the mandatory community service program rationally furthers this state objective. The District reasonably concluded that the mandatory community service program would expose students to the needs of their communities and to the various ways in which a democratic system of volunteerism can respond to those needs. In doing so, the program helps students recognize their place in their communities, and, ideally, inspires them to introspection regarding their larger role in our political system. The program may also help students develop a connection between school and work, and give students

an opportunity to evaluate possible careers. The District was also reasonable in concluding that these goals were best achieved by having students actually perform service for a limited amount of time, and discuss that service, as opposed to merely reading about service opportunities. Indeed, the program's focus on learning-by-doing may be crucial in imparting the lessons of the service program.

Because the District's mandatory community service program is reasonably related to the state's legitimate function of educating its students, we hold that the program does not violate Daniel's parents' Fourteenth Amendment rights.

B. Student Rights

Plaintiffs also argue that the mandatory community service program violates Daniel's rights under the Fourteenth Amendment. Specifically, they allege that the program violates his rights to: (1) personal liberty; and (2) privacy. Having concluded that the program meets a rational basis review, we need change our analysis only if the substantive due process rights asserted by Daniel are "fundamental," and thus require more exacting scrutiny. We find that they do not.

First, Daniel's claim that the prcgram violates his right to "personal liberty" does little more than parrot the language of the Fourteenth Amendment. Although substantive due process rights are guaranteed to an individual, in part, through the liberty component of the Due Process Clause, *see, e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986), this does not mean that a fundamental right is

implicated every time a governmental regulation intrudes on an individual's "liberty." Rather, as mentioned above, strict scrutiny is reserved only for those governmental regulations that implicate personal freedoms "implicit in the concept of ordered liberty." *Palko*, 302 U.S. at 325.

Plaintiffs argue that the choice of when and whether to serve others "has always been left to individual conscience and belief." However, they cite not a single case in which this "individual choice" has been declared a fundamental right, or has warranted strict scrutiny of a governmental regulation. In light of the Supreme Court's recent admonition that we should be "reluctant to expand the concept of substantive due process," *Collins v. City of Harker Heights*, ___ U.S. ___, 112 S.Ct. 1061, 1068 (1992), we decline plaintiffs' invitation to be the first court to so hold. Daniel's choice as to how to spend his free time, and whether or not he will perform any volunteer services, is not the stuff to which strict scrutiny is devoted.

Daniel's proffered right of privacy fares no better. Plaintiffs claim that, by obliging students to disclose the organization for which they volunteered, the program unconstitutionally compels the students to disclose "personal information" protected by the Fourteenth Amendment. It does no such thing.

Initially, we doubt that the program questionnaire and subsequent classroom discussion implicate any constitutional privacy right or interest. Daniel may choose his service organization from a broad array of organizations, some political or religious, and others clearly neutral. If he does not wish to disclose deeply-held political or religious beliefs, he can simply choose one of the

secular, non-partisan organizations. And even if Daniel chooses a political or religious organization, he is not required to state why he chose that group, or whether or not he agrees with its goals and aims, but only what he did and what he learned from the experience.

Nor does the program effectively chill Daniel's ability to join organizations of his own choosing in a private setting. Daniel is not required to disclose every organization for which he volunteers, but only that organization he chooses for his credit toward forty hours of community service. Daniel is free, on his own time and of his own volition, to serve any organization he likes, without having to tell anyone about it. True, Daniel may be tempted to choose a neutral organization over another preferred organization for those forty hours. But this is not so profound a burden as to raise significant constitutional concerns.

Even if Daniel does state a privacy interest cognizable under the Fourteenth Amendment, we find that the required disclosure as part of the program passes constitutional muster. In *Barry v. City of New York*, 712 F.2d 1554 (2d Cir. 1983), we noted that the correct level of scrutiny for a compelled disclosure of personal information is an "intermediate . . . balancing approach." *Id.* at 1559. Because the program furthers the state's significant interest in education, and requires the disclosure of minimal (*if any*) personal information, in the limited setting of the forty-hour service requirement, it is, on balance, easily constitutional.

Plaintiffs reliance on *Shelton v. Tucker*, 364 U.S. 479 (1960), (and similar cases) is misplaced. First, *Shelton*

involved freedom of association under the First Amendment, not a general right to privacy under the Due Process Clause of the Fourteenth Amendment. Second, *Shelton* explicitly limited the scope of its holding in a manner that practically eviscerates Daniel's claim. The Court in *Shelton* dealt with a state law requiring "every teacher as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years." *Id.* at 480. Striking it down, the Court emphasized:

> The question to be decided here is not whether the [State] . . . can ask certain of its teachers about all their organizational relationships. It is not whether the State can ask all of its teachers about certain of their associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity. The question is whether the State can ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period.

Id. at 487-88. The Court concluded that "[t]he unlimited and indiscriminate sweep of the statute" rendered it unconstitutional. *Id.* at 490. In no way does *Shelton*, or any other case cited by plaintiffs, support the notion that Daniel's Fourteenth Amendment right to privacy prohibits the school from requiring Daniel to disclose the single organization for which he performed his limited service in conjunction with a reasonable educational requirement.

In sum, the mandatory community service program does not violate Daniel's Fourteenth Amendment rights.

CONCLUSION

We have considered all or plaintiffs' arguments, and find them to be without merit. Accordingly, the judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th day of February one thousand nine hundred and ninety-six.

Immediato

v Dkt No: 95-7237

Rye Neck School Dist

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellants DANIEL IMMEDIATO ET AL.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

p o ccc
inbancdn—frm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL IMMEDIATO, a minor, by DIANE and EUGENE IMMEDIATO, as Guardians, and in their own right, et al.	
Plaintiffs,	94 Civ 2831(CLB)
– against –	
RYE NECK SCHOOL DISTRICT; KATHLEEN D. GULOTTA, FRANK SPEDAFINO, BEATRICE CERASOLI, ALAN MANOCHERIAN, JANICE K. ANDERSON, LIZ PERELSTEIN, in their official capacities as members of the Rye Neck School District Board of Education; and PETER J. MUSTICH, in his official capacity as Superintendent of Rye Neck School District,	**MEMORANDUM AND ORDER**
Defendants.	

Brieant, J.

Plaintiffs, Daniel Immediato, A Rye Neck high school student and resident of Mamaroneck, New York in this district, together with his parents, Diane and Eugene Immediato, filed this action pursuant to 42 U.S.C. § 1983 challenging the constitutionality of a mandatory community service program ("the Program"), described below, established by Defendants Rye Neck School District and Board of Education. Plaintiffs contend that the Program

violates the students' rights under the Thirteenth and Fourteenth Amendments, as well as the parents' rights to direct the upbringing and education of their children under the Fourteenth Amendment of the United States Constitution.

Pursuant to Fed. R. Civ. P. 56, all parties move for summary judgment. An amicus brief in support of Defendants was filed by the American Alliance for Rights and Responsibilities, a national public interest group with experience in the area of community service programs.

The facts set forth below are conceded to be true, or assumed to be true for purposes of these motions.

Defendant Rye Neck School District is a Union Free School District established by the resident electors pursuant to New York State Education Law. It operates a high school, located in Mamaroneck, New York, which has a current enrollment of 278 students, grades 9 through 12. In 1990 the Rye Neck Board of Education, consisting of members elected by the parents and residents of the district, expressly voted to establish a mandatory community service program in the high school. Commencing with the graduating class of 1992, students in grades 9 through 12 would be required to perform 40 hours of "community service" during the four high school years as a condition of graduation ("the Program").

Students may not receive pay for their services. The required service must be performed "with people in need – people who are poor, homeless, handicapped, or in need of education, supervision, or companionship." Exh. C-1 to Joint Statement of Material Facts. Students may

work with not-for-profit corporations, sectarian and non-sectarian charities, public agencies or political organizations. Many organizations request service through announcements and bulletins posted at school. Students may suggest other agencies or organizations for which to perform service, but the nature of such service must be pre-approved by the school coordinators of the Program in order for students to gain credit for their work.

Half of the required 40 hours can be provided in the form of voluntary service to the Rye Neck School District or to younger students within the District during the school day. A minimum of twenty hours of service, however, must be performed outside the high school.

Students may perform the service at any time during the four high school years, including during the summer. Students may establish their own work schedule by agreement with the recipient agencies or organizations. Any training or necessary supervision of the students is provided by the agencies or organizations, not by the school personnel. After the service is completed, the students must submit to the school verified time sheets which document the number of hours worked.

As part of a required senior year classroom course entitled, "Managing Your Future," all students must complete a questionnaire/form asking "where, when, and what" they did, what they gained from the service, and whether there was "any career connection." Exh. B to Joint Statement of Material Facts. Also as a part of the required course, students discuss in the classroom with the teacher and their fellow students where they performed their service, the type of work they did, and what

they gained from their experience. Students are not required to disclose whey they selected the particular community service or whether or not they agree with the aims of the particular agency or organization.

While the course itself is graded Pass-Fail, if the community service hours are not completed, the student will be ineligible for graduation. The Program makes no provision for students or parents who object to mandatory community service and seek to opt out of the Program or to be relieved from its obligations.

It was disclosed at the hearing before this Court, held on November 10, 1994, that Plaintiffs in this case have not petitioned the Commissioner of Education of New York State for an exemption from the requirement. However, Commissioner Sobol on March 13, 1990, in an administrative appeal from a very similar program having the same title, established in 1987 by the adjoining City of Rye (New York) School District, held that such a program was "not arbitrary, capricious or unreasonable" and found affirmatively that it would "benefit students in their post-graduate endeavors" and that other school districts should be "encourage[d] . . . to pursue this laudable practice." *See Appeal of Anne O'Neill*, Judicial Decision of the Commissioner No. 12,300 (March 13, 1990); Exhibit to Defendants' Memorandum of Law in Support of Motion for Summary Judgment.

Plaintiff Daniel Immediato is currently a student at Rye Neck High School and subject to the mandatory community service requirement as a condition of graduation.[1]

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[1] Plaintiffs Mario Gironda, Jr. and his parents have withdrawn from the litigation.

At the outset, the Court notes the tension between the purposes of majoritarian government and the desires of individuals to live unrestricted by government regulations which appear to them to be worthless, the latter implicating a constitutionally protected liberty interest. These forces clash readily in the area of education, where our nation has enjoyed a long history of encouraging families to take responsibility for the instruction of their own children, while at the same time, making school attendance compulsory and granting control of the curriculum to state and local officials.

The late Honorable Frank C. Moore, who served as Lieutenant Governor of New York, a skilled municipal lawyer and later head of the Office of Local Government of the State of New York, was generally regarded as the guardian and protector of the small units of elected local government in New York. Governor Moore preached that "Home Rule is the right to be misgoverned by our friends and neighbors." The goal of local Home Rule is to allow communities to develop rules and regulations for the management – or mismanagement – of their own affairs, through forms of majority rule existing by the very nature of a republican form of government. An individual may disagree with a particular policy or rule implemented by duly elected local representatives within the scope of the responsibility entrusted to them. Ordinarily, that person must abide by the general law while attempting to persuade others in the community to revise the rule, or to elect new local representatives who will do so.

The United States Supreme Court has recognized the benefits of local responsibility for public education:

> [O]ne of the peculiar strengths of our form of government [is] each State's freedom to 'serve as a laboratory; and try novel social and economic experiments.' No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 50 (1973) (Powell, J., quoting in part from the dissent of Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932)). It is "long recognized that local school boards have broad discretion in the management of school affairs." *Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 863 (1982) (Brennan, J.).

In New York, the Board of Education of a Union Free School District may determine initially whether a particular course or program will be established or discontinued. *See* New York State Education Law § 1709(3) ("The said board of education of every union free school district shall have power, and it shall be its duty . . . [t]o prescribe the course of study by which the pupils of the schools shall be graded and classified. . . . ").[2] The New York State Commissioner of Education, as the chief executive officer of the state system of education, is empowered to enforce all laws relating to the education system of the state. New York State Education Law § 305. In a Union Free School District, the Commissioner is charged with the general supervision of the board of education, and its

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[2] The local board of education may consist of between three and nine trustees who are elected to serve for three, four or five years. *See* New York State Education Law § 1702.

management and conduct of all departments of instruction. New York State Education Law § 309. A party aggrieved by the official actions of local school officials, including a board of education, may appeal for relief to the Commissioner of Education, pursuant to New York State Education Law § 310(7). That right to appeal to the Commissioner of Education supplements but does not preclude redress from a court in the proper case where the plaintiffs allege violation of their Constitutional rights. *See Plano v. Baker,* 504 F.2d 595 (2d Cir. 1974); *Jacobson v. Board of Ed. of City of New York,* 177 Misc. 809, 31 N.Y.S.2d 725 (Sup. Ct. Kings County 1941), *modified on other grounds,* 37 N.Y.S.2d 647 (2d Dept. 1942), *appeal denied,* 39 N.Y.S.2d 416 (2d Dept. 1942). Ordinarily the Commissioner does not address Constitutional issues, but he is free to do so.

It is undisputed that the Board of Education of Rye Neck Union Free School District consists of duly elected officials with authority to establish a curriculum for Rye Neck High School. The New York State Department of Education has approved an optional syllabus for a course comprised of community service. *See Appeal of Anne O'Neill,* Judicial Decision of the Commissioner No. 12,300, at 297. In developing its own curriculum, Defendant Rye Neck Board of Education chose to implement the state syllabus.

Clearly, this Court may grant relief only on a clear showing that *as applied,* the Program violates the Constitutional rights of these Plaintiffs. We are not concerned here with a possible violation of the Constitutional rights of some other student which might be hypothesized. Nor

are we concerned with the wisdom or utility of the Program, which may well seem to some to have Orwellian overtones, or be less useful to the graduates than a foundation course in Latin or English Grammar.

Thirteenth Amendment

Plaintiffs must show infringement of a specific right secured by the Constitution. We consider first, Plaintiffs' claim that the Thirteenth Amendment has been violated. That Amendment provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

U.S. Const. amend. XIII, § 1.

Ratified in 1865, in fulfillment of the Reconstruction goals of the victorious Union, the Thirteenth Amendment had the specific purpose of eliminating African slavery. The Supreme Court has explained that, "the phrase 'involuntary servitude' was intended to extend 'to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results.' " *United States v. Kozminski*, 487 U.S. 931, 942 (1988) (*quoting Butler v. Perry*, 240 U.S. 328, 332 (1916)).

In *Pollock v. Williams*, 322 U.S. 4 (1944) and *Bailey v. Alabama*, 219 U.S. 219 (1911), the Supreme Court struck down state peonage laws that subjected debtors to criminal punishment for failing to perform labor to discharge a

debt. In *Kozminski*, the Court held that involuntary servitude was present, warranting prosecution under 18 U.S.C. § 241 and 18 U.S.C. § 1584, when the defendants, not acting under color of any law, forced two mentally retarded men to perform labor on a dairy farm without pay under squalid and highly abusive conditions. This was accomplished through "physical and verbal abuse for failing to do their work." 487 U.S. at 935.

Kozminski represents a high water mark in Thirteenth Amendment jurisprudence. Not all legally compelled service is prohibited by the Thirteenth Amendment.[3] Governments may require involuntary performance without compensation of well-established civic duties. *See Hurtado v. United States*, 410 U.S. 578, 589 n.11 (1973) (jury service); *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918) (military service); *Butler v. Perry*, 240 U.S. 328, 333 (1916) (work on local public roads). The purpose of the Thirteenth Amendment never included interference with the state's power to compel its own citizens to fulfill essential civic obligations. *Butler*, 240 U.S. at 333.

Our Court of Appeals has concluded that a mental institution may compel a lawfully committed mental patient to perform housekeeping chores or other labor as part of a therapeutic program where the assumed benefit to the patient outweighs the incidental burden of the labor requirement, without violating the Thirteenth Amendment. *Jobson v. Henne*, 355 F.2d 129, 131-32 & n.3 (2d Cir. 1966). However, the same Court also has held that involuntary servitude may exist in "some mandatory

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[3] In *Kozminski* the forced labor was not legally compelled.

programs so ruthless in the amount of work demanded, and in the conditions under which the work must be performed, [so as to be] devoid of therapeutic purpose." *Id.* at 132.

It cannot be contended in the instant case that the Program is so ruthless or devoid of educational purposes. The amount of service required, an average of 10 hours per year, and the flexible conditions under which the service can be performed, do not appear to be ruthless. A reasonable educator could conclude that the program teaches a variety of "real world" skills such as cooperation, organization and communication with others. The Rye Neck Board of Education reasonably could conclude that the benefit to the individual student outweighs the incidental burden of the labor requirement.

Furthermore, this case does not involve the type of physical force or legal sanction present in Supreme Court decisions finding involuntary servitude. The Program does not threaten the students with physical pain, imprisonment or fines. Plaintiffs argue that increased usage of community service programs by the state and federal courts as sentencing alternatives for criminals in order to teach basic work skills and job discipline; as well as to punish, has established that community service is an inappropriate aspect of a school curriculum because such service now has become penal in nature or has acquired some aura of shame or disgrace by association. This Court concludes that any such transferred opprobrium has not been shown to exist in the public perception of student community service.

In *Steirer v. Bethlehem Area School Dist.*, 987 F.2d 989 (3d Cir. 1993), the court concluded that a similar mandatory community service program did not constitute involuntary servitude. After considering Supreme Court and Circuit Court decisions, the *Steirer* court adopted a "contextual approach to involuntary servitude by confining the Thirteenth Amendment to those situations that are truly 'akin to African slavery.' " *Id.* at 1000. The court held that "[t]here is no basis in fact or logic which would support analogizing a mandatory community service program in a public high school to slavery." *Id.* This Court accepts that view, but in doing so we rely on the continued existence of the right to petition the local officials for an exemption or limitation of the Program, and the retained right, if Plaintiffs and a majority of their neighbors find the Program too oppressive, to "throw the rascals out" at the next school board election.

Parental Rights under the Fourteenth Amendment

Plaintiffs contend alternatively that the Program interferes with the Constitutional right of parents to direct and control the upbringing and education of their children.[4] Plaintiffs argue that "the decision to help others must always come from one's conscience and through self-motivation." Plaintiffs' Memorandum in

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[4] As admitted in their Memorandum of law, the parents in this case do not object to the Program on religious grounds. Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment 9.

Support of Motion for Summary Judgment 23. This statement may be self-evident as a matter of philosophy. But nowhere is it found in the Constitution.[5]

Plaintiff parents allege that they possess a Constitutional right to "have their children opt out of programs that are contrary to the beliefs and values they seek to impart." *Id.* at 22. We find no federal caselaw which recognizes a constitutionally protected parental right for students to opt out of an educational curriculum for purely secular reasons. *Cf. Alfonso v. Fernandez*, 195 A.D. 2d 46, 606 N.Y.S.2D 259 (2d Dept. 1993) (issue of parental control over health care, involving distribution of free condoms in schools), *appeal dismissed without op.*, 83 N.Y.2d 906 (1994). Where the United States Supreme Court has considered the constitutionality of school regulations in light of parental challenges pursuant solely to the Fourteenth Amendment, the relevant inquiry is whether the regulation has a reasonable relation to some end within the competency of the state. For example, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court struck down a state law which prohibited the teaching of

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[5] According to the Immediatos:

> We have taught our children through both word and example that to do good for others, without being asked or told and without compensation, is its own reward . . . But never have we told our children that they must, or are obligated, to help others. That would defeat all we have tried to impart to them over the years about serving others and consequently destroy any moral value in serving others.

Plaintiffs' Memorandum in Support of Motion for Summary Judgment 23.

German in schools. The Court stated that "the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State." *Id.* at 403. In *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), the Court held unconstitutional a state law requiring all children to attend public schools through high school, and recognized the right of parents to send their children to a nonpublic school. Writing for the Court, Justice McReynolds enunciated the oft-repeated statement: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535. The Court found that the state regulation "*unreasonably* interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control" and that such rights "may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State." *Id.* at 534-35 (emphasis added).

The Court in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), explained that secular claims for exemption from general laws have a different status than religious claims for exemption. The *Yoder* Court noted, "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations." *Id.* at 215. Rather, "when the interests of parenthood are combined with a free exercise claim . . . , more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." 406 U.S. at 233.

Parents may have "value" based secular objections to many subjects, such as sociology, literature, or biology and will be tempted ultimately to seek intervention by the federal courts to have their children exempted from various classes, exercises, examinations, or activities, in a curriculum established, as in this case, by their duly elected board of education. No public policy will be served by this Court usurping the legitimate authority of school officials to perform their duties in educating citizens; to attempt to do so, because we, or Plaintiffs consider the Program undesirable on purely secular grounds would wreak havoc in the administration of the schools, and involve the federal judiciary impermissibly in matters of local Home Rule.

The issue, therefore, is whether the Program has a reasonable relation to an end within the competency of the state. It is well settled that "a State, having a high responsibility for education of its citizens, [has power] to impose reasonable regulations for the control and duration of basic education." *Yoder,* 406 U.S. at 213. The Supreme Court also has noted the "power of the State to . . . make reasonable regulations for all schools," and "the State's power to prescribe a curriculum for institutions which it supports." *Meyer,* 262 U.S. at 402.

The evidence submitted on these motions shows that the Program is aimed at teaching skills and habits perceived by Defendants as essential for good citizenship. The Program, we are told, "allows students to develop a wide range of personal, intellectual, academic and social skills – such as teamwork, problem-solving, negotiation, communication, planning, and evaluation – that will help them become effective employees, colleagues, citizens,

and leaders." Bradley Aff. ¶ 8; Attached to Amicus Curiae the American Alliance for Rights and Responsibilities' Memorandum in Support of Defendants' Motion for Summary Judgment. If a reasonable person could conclude on the evidence available, or merely by inductive reasoning, that this is really true, and we hold that a reasonable person could so find, then these goals and the Program to effectuate them have a reasonable relation to purposes within the competency of the State. *See Meyer*, 262 U.S. at 403; *Pierce*, 268 U.S. at 535. The appropriate decision-maker of whether to implement a reasonable regulation is not this Court or Plaintiffs. Rather, the Home Rule issue is entrusted by the Constitution and the caselaw to the duly elected trustees of the local boards of education. Their decision can and should be informed by the views of the state Commissioner, supportive in this case, and the wishes of their as yet silent electorate. Plaintiff parents may not use this Court to interpose their own way of life or their own philosophy, however laudable, as a barrier to reasonable state and local regulation of the educational curriculum.

Student Rights under the Fourteenth Amendment

Plaintiffs contend that the students' rights under the Fourteenth Amendment are violated because the Program requires the students to disclose where they performed charitable service, the type of work they did for the organization, and what whey gained from the service.[6]

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[6] Plaintiffs do not claim that the Program violates their First Amendment rights to freedom of speech.

Plaintiffs argue that "a student must either reveal the types of service and organizations he believes are worthy, or must cloak his true moral judgments as to which causes and organizations are worth his time and labor by choosing those that the government and his classmates will view as acceptable." Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment 13.[7]

This assertion is contradicted at least in part by the wide range of available agencies or organizations for which students may choose to perform service, many of which are neutral, as well as the student's right to propose alternative or additional agencies or organizations. No political, religious or moral association is implied by most of the approved services, which include American Red Cross, Blythedale Children's Hospital, Cafeteria/ Hall Assistant, Custodial Assistance, Emergency Medical Services, Home for the Aged of New Rochelle, Mamaroneck Community Nursery School, F<E<Bellows Pizza Day Help, March of Dimes Birth Defects Foundation, New Orchestra of Westchester, New Rochelle Hospital Medical Center, OPUS – Organization of People Undaunted by Stroke, Port Chester Nursing Home, Sunnydale Senior Citizen Home, Tutoring, United Hospital, Volunteers in Archives, West. Lighthouse for the Blind,

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[7] If on occasion a high school student must cloak his or her true moral judgments by expressing in class views which are insincere but politically correct and likely to gain favor with the teacher, it would indeed be regrettable but not actionable under the Fourteenth Amendment.

Westchester County Medical Center, Westchester Developmental Disabilities Service Office. *See* "A Sampling of Community Service Options," Ex. C-2 to Joint Statement of Material Facts. A student may perform all forty hours of service for "neutral" agencies and organizations. Under these circumstances, the limited information to be disclosed in the questionnaire/form and class discussions would not seem to force students to reveal or suppress moral judgments. *See Shelton v. Tucker*, 364 U.S. 479 (1960) (prohibiting disclosure of every organization to which teacher belonged or regularly contributed within five years as scope of inquiry was completely unlimited). Elective choices a student makes, such as choosing one foreign language over another, or selecting a project, book or subject for a paper, often may involve indicia of personal preference or opinion. This does not implicate a privacy interest worthy of Constitutional protection. This Program as administered does not seem in practical reality to require students to reveal information or beliefs protected by the Fourteenth Amendment.

Abstention

Defendants urge *Burford* abstention.[8] However, in order to determine the constitutionality of the Program, this Court need not analyze any disputed issues of state law. There are no factual determinations of state agencies or courts at issue. *See Alliance of American Insurers v. Cuomo*, 854 F.2d 591, 601 (2d Cir. 1988) (*Burford* abstention held inappropriate). That state courts are also capable of

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[8] *Burford v. Sun Oil Company*, 319 U.S. 315 (1943).

deciding the constitutional issues raised does not, in and of itself, require this Court to abstain from deciding the issues in this case. Accordingly, *Burford* abstention is inappropriate.

For the foregoing reasons, the motion for summary judgment in Defendants' favor is granted and Plaintiffs' motion is denied. Settle a final declaratory judgment on notice or waiver of notice.

SO ORDERED.

DATED: White Plains, New York
January 19, 1994

CHARLES L. BRIEANT
Charles L. Brieant, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL IMMEDIATO, *et al.*, Plaintiffs, v. RYE NECK SCHOOL DISTRICT, *et al.*, Defendants.	AFFIDAVIT OF EUGENE AND DIANE IMMEDIATO 94 Civ. 2831 (CLB)

Eugene and Diane Immediato, being duly sworn, depose and say:

1. We are plaintiffs in this action and make this affidavit based upon our personal knowledge of the facts herein set forth.

2. We are the parents of Daniel Immediato, also a plaintiff in this action, and a student at Rye Neck High School.

3. As parents, we have a clear sense of how we wish to raise our children. During their entire lives, we have tried to teach our children good values and provide them with the knowledge we feel necessary for them to realize their full potential as happy, successful individuals. It is a responsibility we take very seriously, and have done so since their birth.

4. We have taught our children, through both word and example, that to do good for others, without being asked or told and without compensation, is its own

reward. Many times, our children have seen us lend a hand to others and have eagerly assisted when it was appropriate. But never have we told our children that they must, or are obligated, to help others. That would defeat all we have tried to impart to them over the years and rob service of any meaning or worth.

5. We believe our son Daniel has taken these lessons to heart. To help his parents financially, he has gone for training after school and is now a completely certified lifeguard. As a lifeguard, he works after school and over the summers and ultimately bears enormous responsibility for the safety of others.

6. When Rye Neck first started requiring kids to do community service, our children, including Daniel, came to us and asked if the school district could force them to do this. Our response was that unless you are a criminal or been drafted into the military, no one can be forced by the government in this country to serve others. As we and our children were soon to find out, however, Rye Neck School District sent the exact opposite message to our children. By imposing service requirements, Rye Neck was in effect telling our children that they can be forced to serve others against what we as parents have told them or they will not get a high school diploma.

7. To us, mandatory community service is a real threat to our parental authority, mainly because it's primary motivation is based upon power and control. We believe that school officials are expanding their control over our son into an area in which they have no authority to do so, all under the guise of education. We feel this expansion of power is to the detriment of our son, our

parental authority, and the important values we try to teach him.

8. We believe the primary responsibility for our son's moral education lies with us. We send our children to the public school mainly to teach them how to read and write. School officials have told us that all students at Rye Neck must learn how to give something back to the community. We believe that it is not up to the government or the public schools to determine what our children owe to the community. That is a decision we will make within the family.

9. We have always taught our children that the desire to help others must come from within. People must make the choice for themselves whether or not to serve others. We firmly believe that our son's forced participation in this program will not teach him the value of helping others. We've already taught him that. Rather, the greatest lesson received will be that the government can force you to do something we always taught him was left up to his own choice. We believe that lesson is extremely destructive of our authority as parents. The inevitable consequence of our son's forced participation in the program is that he will look to the government, as opposed to his parents, for guidance on matters of individual choice and morality.

10. We are a family of modest means and as such we cannot afford to send our children to private schools. The only way our son will receive a high school diploma is if he stays at Rye Neck. But Rye Neck School District will only give him a diploma if he performs the mandatory community service we so strenuously object to. We

believe that to be a violation of our authority as parents and of the U.S. Constitution. That is why we decided to fight this program in court.

FURTHER AFFIANTS SAITH NOT.

/s/ Eugene Immediato
Eugene Immediato

/s/ Diane Immediato
Diane Immediato

Subscribed and sworn to before me
this 14th day of October, 1994.

/s/ Jill M. Keogh
Notary Public, State of New York

JILL M. KEOGH
Notary Public, State of New York
No. 4040956
Qualified in Westchester County
Commission Expires August 31, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIEL IMMEDIATO, *et al.*, Plaintiffs, v. RYE NECK SCHOOL DISTRICT, *et al.*, Defendants.	94 Civ. 2831 (CLB)

JOINT STATEMENT OF MATERIAL FACTS

The parties submit the following stipulation of material facts relevant to the resolution of their motions for summary judgment:

1. Defendant Rye Neck School District is a union free school district pursuant to § 1701 of New York State Education Law. Its high school, located in Mamaroneck, New York, has a current enrollment of 278 students, grades 9-12.

2. In 1990, defendant Rye Neck School District and the Board of Education then holding elective office determined that students in grades 9 through 12, commencing with the class to graduate in June 1992, would be required to complete 40 hours of community service during the four high school years as a requirement of graduation.

3. Failure to complete the program as specified makes a student ineligible for graduation. The program

makes no provision for students and their parents who object to mandatory community service to opt out of the program.

4. The 40 hours of service may be provided to not-for-profit corporations, charities, political organizations or public agencies. Twenty hours of the required 40 hours can be provided to defendant School District or to younger students within the District during the school day. A minimum of twenty hours of service must be performed outside the high school.

5. Students may not receive pay for their services nor may their services displace activities performed by paid employees in accordance with the New York Syllabus on "Community Service/Internship Model."

6. Many local not-for-profit organizations and charitable organizations have requested service of the students through announcements made by the community service coordinator at the school and through the placement of bulletins from organizations requesting such services.

7. A student may suggest organizations or agencies for which to perform their service which have not requested such services or which have not been suggested by the Rye Neck School District administration but such service must be pre-approved by the school coordinators of the program to gain credit toward completion of the service requirement.

8. The organization or agency for which the student performs the work must document the hours worked by the student and the student must turn over these verified

time sheets to the school. A copy of this form is attached as Exhibit A.

9. Students may perform the 40 hours of community service at any time during the four high school years including over the summers of such years. Students set their own work schedule and provide their own transportation for work performed outside defendant Rye Neck School District.

10. Organizations and agencies in which students perform service are responsible for providing any training or necessary supervision. The School District coordinators of the program are responsible for communication with the organizations or agencies in which students are performing community service.

11. As part of the required senior year course, "Managing Your Future," the students must complete a form documenting and summarizing their community service (where and when they performed the service and the type of work they did) and setting forth what they gained from this service. A copy of this form is attached as Exhibit B. The form does not ask the student to state why he or she selected the particular community service or whether or not he or she is in agreement with the aims of the particular organization or agency.

12. As a part of the required senior year course, "Managing Your Future," students discuss with the teacher and their fellow students where they performed their service, the type of work they did, and what they gained from their experience. Students are not required to discuss why he or she selected the particular community

service or whether or not he or she is in agreement with the aims of the particular organization or agency.

13. In June proceeding their senior year, students are provided with a letter setting forth the requirements of the community service program and the Managing Your Future course. Exhibit C is a copy of such letter.

14. Enclosed with the letter is a series of questions and answers regarding the community service program. A copy of this document is attached as Exhibit C1.

15. Also enclosed with the letter is a sample listing of community service options. A copy is attached as Exhibit C2.

16. Also enclosed with the letter is a statement of the grading policy of the community service program. A copy is attached as Exhibit C3.

17. Plaintiff Daniel Immediato is currently a student at Rye Neck High School and subject to the mandatory community service requirement as a condition of graduation.

18. Mario Gironda, Jr. and his parents, Mario and Sandra Gironda, originally joined in the instant case. Due to personal reasons, Mario Gironda, Jr., has decided to withdraw from the suit. Therefore, his parents also withdraw as plaintiffs. This withdrawal does not affect nor prejudice the status of the suit. However, any remedy granted by the court would not apply to Mario Gironda, Jr.

19. Plaintiff student states that he does not object to charity, but believes that charitable activities and community service work must be voluntary and left to an individual's conscience. He objects to required participation in defendants' mandatory community service program.

20. Plaintiff student also desires to keep information concerning any service activities he may perform private.

21. Plaintiff parents state that they support private, charitable efforts and voluntary service to the community, but fundamentally believe that the decision to help others must always come from one's own conscience and that it cannot be imposed by the government. They attempt to impart these values to their children. As a result, they object to their childrens' participation in defendants' mandatory community service program.

22. Defendants state that the educational interests or purposes of the mandatory community service program include having students learn about the community and the needs of the community, to learn what services are necessary to meet the needs of the community and its citizens, to meet people and see what they do and, if possible, to become involved in internships with government officials and agencies. The community service program, as incorporated into the course "Managing Your Future," is further intended as a bridge between school and work or school and college, to give students an opportunity to look at possible careers.

23. Student responses and answers to the question "What Did You Gain From Community Service?" are attached here as exhibit D.

Respectfully submitted,

/s/ Phyllis S. Jaffe
Phyllis S. Jaffe
(PJ-7584)
PLUNKETT & JAFFE, P.C.
1 North Broadway
White Plains, New York 10601
(914) 948-7722
Attorneys for Defendants

/s/ Scott G. Bullock
INSTITUTE FOR JUSTICE
William H. Mellor III
Clint Bolick
Scott G. Bullock
1001 Pennsylvania Ave., NW
Suite 200 South
Washington, D.C. 20004
(202) 457-4240
Lead Attorneys for Plaintiffs

Lance J. Gotko
(LG-5443)
875 Third Avenue
8th Floor
New York, New York 10022
(212) 833-1115
Local Counsel for Plaintiffs

RYE NECK HIGH SCHOOL

1992-1993

COMMUNITY SERVICE HOURS

STUDENT NAME: _____

DATE	HOURS	PLACE	TYPE OF SERVICE
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	

(PLEASE USE SECOND SHEET IF MORE ROOM IS NEEDED)

ADVISOR SIGNATURE (PRE-APPROVAL) _____

STUDENT SIGNATURE _____

ADVISOR SIGNATURE (ON COMPLETION) _____

CONTACT _____

TELEPHONE _____

COMMENTS _____

Mr. Sgroi Managing Your Future

NAME _____

SUMMARIZE YOUR COMMUNITY SERVICE (Where, when, what did you do)

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

What DID YOU GAIN FROM THIS SERVICE

_____
_____
_____
_____
_____
_____
_____
_____
_____

ANY CAREER CONNECTION

_____
_____
_____
_____

FURTHER COMMENTS

_____

(LOGO) RYE NECK UNION FREE SCHOOL DISTRICT
(914) 698-6171 FAX: (914) 698-8519

Rye Neck High School
300 Hornidge Road
Mamaroneck, NY 10543

Peter J. Mustich
Superintendent of Schools

Dr. Barbara Ferraro, Principal

June, 1993

Dear 1993-1994 Seniors:

Congratulations upon entering your senior year. As seniors, you will be taking some additional responsibilities and one of these is to participate in the Rye Neck Community Service Program which is a requirement for graduation.

You may wish to begin fulfilling the 40 hours of community service requirement over the summer. To do this properly and receive credit you must register with Mrs. Dammacco or Mr. Sgroi, *prior to beginning your community service.* We will need the name of the place where you are volunteering, the number of hours you are planning to contribute and the name and telephone number of your supervisor.

Community service must include a minimum of 20 hours outside Rye Neck High School.

Managing Your Future, is a 10-week course which must be given to all seniors participating in the Community Service Program. The State Education Department will not accredit the service program unless such a course is given and attended in 1993-1994.

The deadline for the completion of your community service requirement is May 1, 1994. We seek to recognize the valuable contribution you make to the school community.

If you would like to contribute to your community hours during the summer, we have enclosed a list of possible sites. Also enclosed is the Pass/Fail grading policy for community service; as well as some frequently asked questions and answers. If you have any ideas, suggestions, or questions, please feel free to see either Mr. Sgroi or Mrs. Dammacco.

Sincerely,

/s/ Adrienne Dammacco
Mrs. Adrienne Dammacco
Community Service
Coordinator

/s/ Peter Sgroi
Mr. Peter Sgroi
Community Service
Coordinator

"Excellence in Education"

RYE NECK HIGH SCHOOL
COMMUNITY SERVICE PROGRAM

1. Why must I perform service?

   To respond affirmatively and actively to the need for community service.

   To make a positive difference in the lives of people in need.

To contribute back to a larger community that has served you.

To learn about yourself and to develop a sense of responsibility.

To fulfill a graduation requirement of Rye Neck High School.

2. How much service must I do?

A minimum of forty (40) hours. Be aware that although the Service Program requires only 40 hours, certain agencies require more hours. In those cases, you are required to fulfill the agency's requirements.

3. What counts as service?

The direct provision of a basic human service to a person or people in need without remuneration. A minimum of half of your service must be performed outside of school.

You may work *with people in need – people who are poor, homeless, handicapped, or in need of education supevision* [sic], *or companionship. Activities such as clerical work, aiding, coaching a sport who* [sic] *not qualify.*

4. Who arranges my service project?

You arrange your own project. Projects must be approved by the Service Coordinators. Attached is a lsit [sic] of approved agencies. If there is an agency that you would to [sic] volunteer for that is not on tis [sic] list, speak to your service coordinator about it. Specific procedures and forms will be explained at the beginning of the 1992-1993 school year.

5. When may I begin to accumulate service hours?

   You must start your project by October 1 of your senior year. Community Service projects may begin the summer before senior year under two conditions. First, the project must be approved in advance by the Service Cordinators. No projects will be approved retroactively.

6. When must the project be completed?

   Service projects must be completed by April 1 of senior year. A request for an extension must be submitted in writing to the Service Office before April 1.

7. How important is the Service Course?

   The Service Course is seen as an integral part of a RNHS education.

8. Where can I get further information about the Community Service Program.

   Mr. Sgroi or Mrs. Dammacco are available to help you during school hours.

A Sampling of
COMMUNITY SERVICE OPTIONS

Aids Related Community Services
Volunteers in Archives
Tutoring:
- F.E. Bellows
- Rye Neck High School
- Rye Neck Middle School
- Special Education
- BOCES

Planned Parenthood
Burke Rehabilitation
West, Lighthouse for the Blind
United Hospital
Westchester County Medical Center
United Hebrew Geriatric Center
Westchester Developmental Disabilities Service Office
Blythedale Children's Hospital
Cafeteria/Hall Assistant
Home for the Aged of New Rochelle
REEF
Sunnydale Senior Citizen Home
Jewish Child Care Association
Emergency Medical Services
March of Dimes Birth Defects Foundation
New Rochelle Hospital Medical Center
OPUS – Organization of People Undaunted by Stroke
Food Pantry (Village of Mamaroneck)
Mamaroneck Community Nursery School
Port Chester Nursing Home
American Red Cross
Custodial Assistance
F<E< Bellows Pizza Day Help
First Baptist Church Child Care Center
Key Club (specific functions to be discussed)
KEEPS – St. Vito's After School Program
People Together (Helping Homeless)
Congressional Aid
New Orchestra of Westchester
Rye Nature Center

1993 – 1994
COMMUNITY SERVICE
GRADING POLICY

In order to fulfill your community service requirement you must document and verify the minimum of 40 service hours. The community service plan you wish to follow may be designed by you or your advisor, however, *you must get prior approval by your advisor before starting your service.*

Service hours must be documented on the proper form which is available from Mrs. Dammacco or Mr. Sgroi. Service work may not be for traditional academic credit or pay, and in some way must be shown to service the community. Service must be preformed in conjunction with a not-for-profit organization.

SCORING

FIRST QUARTER GRADE: If the student has made a commitment and gotten approval of a specific service and has preformed [sic] and had documented at least 10 hours of the service that student will receive a P (PASS) for the quarter.

If the student has not done the above an INCOMPLETE will be given.

SECOND QUARTER GRADE: A commitment as well as preapproval and a *minimum of at least half (20 hours)* of community service completed will give the student *a P (PASS)* for the quarter.

A commitment but *less than half of the requirement* will result in an *INCOMPLETE.*

No commitment and/or less than 10 hours of completed service will result in a *FAILURE* for the second quarter.

THIRD QUARTER GRADE: A commitment *as well as completion of 40* hours with prior approval will receive a *PASS*.

A commitment with more than 20 hours but less than completion will receive an INCOMPLETE.

No commitment and/or *less than 20 hours* will result in *FAILURE* for the third quarter.

FOURTH QUARTER GRADE: *Completion of all community service hours is expected by May 1, 1994.* If at this time a student has not completed his/her commitment, the Principal as well as the student's parents will be notified that the student's graduation is in jeopardy.

* * *

INTERROGATORY 11

11. Describe in detail the mandatory community service program's requirement stated in paragraph 9 of the Answer that student service activities may not replace work for which payment is made, including explanation of how, why, and by whom this requirement was developed.

RESPONSE:

11. The requirement that student service activities may not replace work for which payment is made is set forth in the syllabus of the New York State Education Department.

INTERROGATORY 12

12. (a) Describe in detail the standards and procedures that govern whether service performed for religiously-affiliated institutions or organizations is eligible for credit under the mandatory community service program.

(b) If any religiously-affiliated activities have been accepted or rejected under the mandatory community service program, identify the institution, organization, and type of service activity accepted or rejected.

RESPONSE:

12.(a) Service performed for religiously-affiliated institutions or organizations is approved when the activity involves, for example, clothing drives and food drives including students making sandwiches for the midnight

run to New York City to provide food to homeless persons. Service such as proselytizing on the street or door to door in favor of a particular religion would not be approved.

(b) A student who was a member of Jehovah's Witnesses asked to receive credit for proselytizing, which was denied. He later received credit for participating in the midnight run to New York City.

INTERROGATORY 13

13. (a) Identify all organizations and agencies that have requested service of students as stated in paragraph 9 of the Answer.

(b) If any organizations or agencies that have requested service of students have been denied such service, identify those organizations or agencies and state in detail the basis for denial of student service to those groups.

RESPONSE:

13.(a) Organizations and agencies that have requested service include the United Hospital of Port Chester, the Village of Mamaroneck, the Sara Newman Nursing Home, the Greenburgh Nature Center and the Multiple Sclerosis Society. In addition, see documents produced under Plaintiffs' First Set of Requests for Production of Documents.

(b) No organizations or agencies that have requested service of students have been denied such service in the memory of staff members.

INTERROGATORY 14

14. (a) State whether suggestions are made to students about what service activities are available or appropriate under the mandatory community service program.

* * *

program was adopted were Beatrice Cerasoli, Miles Federman, Kathleen Gulotta, Robert Reich, Francis Spedafino, Stewart Sterk.

Dated: White Plains, New York
July 18, 1994

/s/ Phyllis S. Jaffe
Phyllis S. Jaffe (PJ7584)
PLUNKETT & JAFFE, P.C.
Attorneys for Defendants
1 North Broadway
White Plains, New York 10601
(914) 948-7722

To: Lance J. Gotko, Esq.
Attorney for Plaintiffs
875 Third Avenue, 8th floor
New York, New York 10022
(212) 833-1115

Scott G. Bullock, Esq.
Institute for Justice
Attorneys for Plaintiffs
1001 Pennsylvania Avenue, N.W.
Suite 200 South
Washington, D.C. 20004
(202) 457-4240

LOGO

March 20, 1996

COVER STORY

Growing debate centers on who teaches values

By Tamara Henry
USA TODAY

Eugene Immediato is a Ward Cleaver sort of guy who wants to be the sole role model for his sons. So when the Rye Neck school district in Mamaroneck, N.Y., required community service for his son Daniel to graduate, he took educators to court.

Waymon Earls, a burly wrecker driver from Toccoa, Ga., charges the Stephens County School District has "stolen my little girls" because his two daughters, ages 13 and 14 at the time, were secretly given HIV tests, pap smears, birth control pills and condoms in the school clinic after talking with a counselor. Earls and his wife, Sharon, are dismayed that such things could be done to their children "without their consent, or notice or anything," says attorney E.W. "Chip" Angell, who filed suit on the family's behalf last June.

Hot-button issues

Here are some of the issues that pit parents against schools:

- Sex education, abstinence, homosexuality and AIDS prevention.
- Distribution of condoms and birth control pills.
- Whether prayers can be allowed in schools and at school functions.
- Alcohol and drug education.
- Death education, including abortion, euthanasia, suicide, violence.
- Content of textbooks, audio-visual materials.
- Witchcraft.
- Dress codes, like uniforms and boys' earrings.
- Community service.
- Multiculturalism.
- Roles of males and females, divorce.

The two fathers are among a growing number of parents challenging schools, government and other bureaucracies that seek to dictate values, distribute condoms, impose sex and AIDS education and restrict religious talk. "Parental rights" is a new rallying cry, especially among conservatives, homeschoolers and religious right activists.

COVER STORY *(continued)*

Educators: Parents want it both ways

"There's just a massive movement in this country for parents to take back the schools," Sen. Charles Grassley, R-Iowa, told USA TODAY. "They're beginning to ask questions. They're finding bureaucratic hoops to go through. They're finding stonewalling on the part of educators, even at the local level, to get some basic information. They can't believe it. It's a frustration."

Mary G. Jarvis, principal of Smoky Hill High School, Cherry Creek, Colo., describes this generation of parents as "vigilante consumers" who burned flags, marched in Selma, Ala., and violently protested the Vietnam War. "Those are now our parents. Don't you think they might have a little different attitude about things and want their rights?"

Grassley and Rep. Steve Largent, R-Okla., have introduced long-shot bills addressing parents' rights to direct their children's education, health care, religious training and discipline. Grassley is more optimistic about the Family Privacy Protection Act, which passed the U.S. House in April.

This bill would broaden the scope of parental consent to include questionnaires given to minors in programs or activities "funded in whole or in part by the federal government." The House bill is now before a Senate committee.

The National PTA, in a letter-writing campaign to members of Congress launched this month, describes the bill as "excessive and unnecessary."

Michael D. Simpson of the National Education Association, the nation's largest teachers' union, says the legislation means locally elected school officials would no longer have the authority to make decisions on school curricula and educational policy. He says parents would have the right to sue teachers in federal court for money damages and attorneys' fees if the teacher says anything in class that the parent doesn't like. He also says students would have the right to carry knives, guns and other weapons to school; he points to a U.S. Court of Appeals ruling in California that allows children to carry 7-inch knives with them to school because of their Sikh religion.

Still, Angell, who says movement on his lawsuit has been slow, asks: "How would you feel if some (school officials) tell you, 'it is none of your damn business' . . . and give your daughters a bag of condoms?

"The government has gotten too intrusive and too Big Brother. We don't need any more government in our families."

Immediato agrees. "What Daniel gives back to the community really should be my concern. (The school) wants to take over the responsibility of teaching my child the goodness that comes from giving of oneself. I want to do that myself. That's a parent's job."

Some school officials would argue that parents have come to expect schools to take more, not less, responsibility for their kids. Parents can't expect to have it both ways.

Principal Jeanne Friedman at Ojus Elementary School in Miami Beach spends hours of her day telephoning

homes to locate absent students. She says some parents leave their children at school hours before doors open or pick them up long after closing.

"You want to know the Jeanne Friedman pet peeve? It's not being able to contact anyone for that child. To me, that's a cardinal sin."

Phyllis Schlafly of the conservative Eagle Forum of Alton, Ill., says, "Schools were set up to teach children to read and write. That's what they ought to concentrate on. Just because some parents fall down on the job doesn't mean the school can administer . . . therapy to other children."

"Who decides what's in the best interest of children? Is it going to be the children's parents, or is it going to be the government?" asks Greg D. Erken of the parental rights advocacy group Of the People.

Instead of taking a kinder, gentler approach – "seeking redress through limited statutes" – Erken says, "We need to take, frankly, a blunt 2-by-4 to the judiciary and bureaucracies of the school system to remind them that the parents are sovereign as citizens, particularly over their own children."

Grassley admits a federal law would be unnecessary if states act. Of the People already has legislators in 28 states sponsoring a Parental Rights Amendment to state constitutions.

Erken admits it can take years to pass a constitutional amendment. Most states require approval from both houses of the legislature; then voters need to ratify the

amendment. He says some states, like Michigan, allow action in a year.

In Colorado, the group is pursuing an initiative route, planning a campaign to get 55,000 signatures for it to appear on the November ballot. But first a court challenge must be resolved.

Parental rights are not guaranteed by the Constitution, says Dwight G. Duncan, Southern New England School of Law. "The courts seem to give the parental rights language (in key cases) lip service and really don't put any teeth into it. It's being . . . gummed to death."

In the Immediato case, the Second U.S. Circuit Court of Appeals upheld the Rye Neck school district's requirement that students complete 40 hours of community service to get a diploma, ruling the practice educational, not exploitative. Immediato and his attorneys are discussing an appeal.

Daniel Immediato, now 19, completed his senior year without complying with the requirement. He left school without a diploma.

Supreme Court, U.S.
FILED
JUN 17 1996
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(2)

No. 95-1861

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL IMMEDIATO, DIANE IMMEDIATO and EUGENE IMMEDIATO,

Petitioners,

vs.

RYE NECK SCHOOL DISTRICT; KATHLEEN D. GULOTTA, FRANK SPEDAFINO, BEATRICE CERASOLI, ALAN MANOCHERIAN, JANICE K. ANDERSON, LIZ PERELSTEIN; and PETER J. MUSTICH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PLUNKETT & JAFFE, P.C.
*KEVIN J. PLUNKETT, ESQ.
PHYLLIS S. JAFFE, ESQ.
ELIZABETH S. TORKELSEN, ESQ.
Counsel for Respondents
1 North Broadway
White Plains, New York 10601
(914) 948-7722

*Counsel of Record

45 pp

COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly determined that the community service requirement of respondent school district does not infringe upon any parental liberty right cognizable under the Fourteenth Amendment to the United States Constitution.

2. Whether the Court of Appeals properly determined that the community service requirement of respondent school district does not infringe upon any personal liberty right of students cognizable under the Fourteenth Amendment to the United States Constitution.

JURISDICTIONAL STATEMENT

Respondents, RYE NECK SCHOOL DISTRICT; KATHLEEN D. GULOTTA, FRANK SPEDAFINO, BEATRICE CERASOLI, ALAN MANOCHERIAN, JANICE K. ANDERSON, LIZ PERELSTEIN, in their official capacities as members of the Rye Neck School District Board of Education; and PETER J. MUSTICH, in his official capacity as Superintendent of Rye Neck School District (hereinafter "respondents" or "the school district") concur with the Jurisdictional Statement set forth in the Petition of DANIEL IMMEDIATO, DIANE and EUGENE IMMEDIATO, (hereinafter "Petitioners").

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No. 95-1861

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL IMMEDIATO, DIANE IMMEDIATO and EUGENE IMMEDIATO,

Petitioners,

vs.

RYE NECK SCHOOL DISTRICT; KATHLEEN D. GULOTTA, FRANK SPEDAFINO, BEATRICE CERASOLI, ALAN MANOCHERIAN, JANICE K. ANDERSON, LIZ PERELSTEIN; and PETER J. MUSTICH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Educators have recognized a distinct need to have students graduate with "real world" skills, which cannot be acquired sitting in a classroom.[1] Business people have also identified the need to have students acquire such skills before entering

[1] *See, e.g.,* School-to-Work Opportunities Act, 20 U.S.C. § 6650; National and Community Service Act of 1990, 42 U.S.C. §12501 et seq.

the workforce and have consequently instituted their own outreach programs to facilitate the school to work transition.[2]

Based on these concerns and observed educational needs, Respondent Rye Neck School District[3] determined that students could best acquire these "real world" skills through active participation in community work environments. Community service learning is active learning, not "activist" learning, as Petitioners have portrayed it.

In 1990, the Rye Neck School District Board of Education determined that students in grades 9 through 12, commencing with the 1992 graduating class, would be required to complete 40 hours of community service during the four high school years as a requirement for graduation, in connection with a course entitled "Managing Your Future." (A. 46).[4] "Managing Your Future," was developed in relation to a required senior history course on government. (R-6). The course has both a classroom component and an out-of-classroom component (the community service requirement). Completion of both components is necessary to pass the course. (A-56, A-59-60). The course is graded on a pass/fail basis. (A-55).

---

[2] *See, e.g., Mentoring in Schools,* Wall Street Journal, May 9, 1995, p. 1 at col. 5.

[3] Respondent school district is a union free school district organized pursuant to New York State Education Law §1701. Its high school, located in Mamaroneck, New York, has a current enrollment of 278 students, grades 9 through 12. (A-46) (References to the Appendix to the Petition are preceded by "A-"; for the sake of clarity, references to the Appendix to Respondents' Opposition to the Petitioner are preceded by "R-."

[4] The community service program was developed by the school district through a review of a New York State Education Department syllabus on "Community Internship/Internship Model," a review of the programs in other school districts and states, a review of the decision of the New York State Commissioner of Education encouraging school districts in New York State to adopt such programs, and a perceived need to have students, particularly seniors, move successfully into the real world.

The community service program, as incorporated into the course "Managing Your Future," serves as a bridge between school and work or school and college and gives students an opportunity to examine potential careers -- a valuable opportunity they could not obtain sitting in a classroom. The program also acquaints students first hand with good citizenship and civic responsibilities. The specific educational goals of the program include having students learn about the community and the needs of the community; having students learn what services are necessary to meet the needs of the community and its citizens; encouraging students to meet a diverse section of the community and see what they do and, if possible, to become involved in internships with various organizations and agencies. (A-50).

Students may perform the community service component in a variety of settings. The school district coordinators of the program provide students with a lengthy list of organizations and agencies from which they may choose. Included on that list are the American Red Cross, the Mamaroneck Community Nursery School, Volunteers in Archives, United Hospital, Westchester Lighthouse for the Blind, New Orchestra of Westchester, the Rye Nature Center and the local food pantry, along with numerous other organizations. (A-57-58).

Students are permitted and indeed encouraged to select other organizations or agencies for which to perform their service. In order for students to earn credit toward completion of the service requirement the proposed service must be preapproved by the school district coordinators of the program. (A-47).

Students may perform the 40 hours of community service at any time during the four high school years including the summers. Twenty hours of the required 40 hours can be provided to younger students (i.e. tutoring) within the school district during the school day. (A-47). Students may not receive pay for their services nor may their services displace activities performed by paid employees in accordance with

the New York State Syllabus on "Community Service/Internship Model." (A-47).

Petitioner Daniel Immediato ("Daniel") was a student at Rye Neck High School and therefore required to complete the out of classroom community service component of the program in order to graduate. Daniel and his parents object, on non-religious grounds, to the school district's mandatory community service program because they believe that the program violates a parental liberty right to direct the upbringing of Daniel. Consequently, Petitioners claim that a high school's choice of curriculum should be subject to strict scrutiny review and consequently that school districts must show that their choice of a particular curriculum is narrowly tailored to serve a compelling state interest.

Application of strict scrutiny to review a high school's choice of curriculum is unprecedented and unwarranted. Respondents agree that there are certain fundamental personal rights which have been revered since the Constitution was written and with which the state may not interfere. No federal court has held, however, that a parent has a fundamental liberty interest to compel a public school district to tailor its curriculum to the parent's individual secular beliefs. On the contrary, this Court has made it clear that the provision and regulation of public education "ranks at the apex of the function of a State."[5] This Court has long recognized that the state has the right to prescribe a reasonable curriculum for its schools and has consistently held that secular objections to curriculum cannot form the basis of a legally cognizable constitutional challenge. The right to raise one's children as one sees fit has never been interpreted to mean that parents may substitute their own idiosyncratic judgment regarding appropriate curriculum for that of the local school board.

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[5] *Wisconsin v. Yoder,* 406 U.S. 205, 213, 92 S.Ct. 1526, 1532, 32 L.Ed.2d 15 (1972).

As the school district's students move into the 21st century, they will need skills beyond the three R's to become effective citizens, employees, and leaders. As conceded by Petitioners, the community service program provides students with "real world" experience, problem solving skills and potential career contacts and opportunities which they cannot acquire sitting in a classroom. Petitioners seek to have the Court hear this case even though, as argued below, this Court has never held that there is a parental right to usurp a local board of education in matters of curriculum and there is no conflict among the Circuit Courts of Appeal. Accordingly, the school district urges the Court to affirm the district court in upholding the community service program.

THE PETITION FOR CERTIORARI SHOULD BE DENIED

I. APPLICATION OF STRICT SCRUTINY TO REVIEW THE DECISIONS OF LOCAL SCHOOL BOARDS CONCERNING APPROPRIATE CURRICULUM IS UNPRECEDENTED AND UNWARRANTED.

Today, Petitioners invite the courts to sit as super-school boards to make decisions about appropriate curriculum and to determine whether each course is narrowly tailored to serve a compelling state interest. Contrary to Petitioners' assertions, the application of strict scrutiny review will wrest decisions about curriculum from the hands of educators and place them in the hands of courts -- undoubtedly to the consternation of both. The application of strict scrutiny review to all educational programs of school districts will cripple public school districts by subjecting them to a flood of litigation filed by disgruntled parents. Indeed, no school district will be able to establish minimum academic requirements for graduation without facing the prospect of litigation.

The District Court and the Court of Appeals properly rejected Petitioners' invitation to subject the school district's program to strict scrutiny. In applying a rational basis test, the Second Circuit stated that,

> [p]laintiffs argue for a "constitutional right of parents to have primary responsibility over the upbringing and education of their children," and they contend that such a right is sufficiently basic and traditional to warrant strict scrutiny ..... We appraise this request with humility and caution, as "judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field"
>
> ....
>
> ...where, as here, parents seek for secular reasons to exempt their child from an educational requirement and the basis is a claimed right to direct the "upbringing" of their child, rational basis review applies. *Immediato v. Rye Neck School District,* 73 F.3d 454, 461-462 (2d Cir. 1996).

Similarly, this Court and Circuit Courts of Appeal have consistently held that while parents have a right to direct the upbringing of their children, this right does not permit parents to substitute their opinions for that of the local school district in designing an appropriate curriculum. *See, e.g., Runyon v. McCrary,* 427 U.S. 160, 176, 96 S.Ct. 2586, 2597, 49 L.Ed.2d 415 (1976). As this Court cautioned in *Runyon*, the opinions in *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) and *Meyer v. Nebraska*, 262 U.S. 390, 402 (1922) upon which Petitioners heavily rely should not be read to create a separate constitutional basis upon which parents could bring a fundamental rights challenge against any educational program of which they disapproved. *Runyon,* 427 U.S. at 176-177, 96 S.Ct. at 2597-2598, 49 L.Ed.2d 415. Further this Court stated,

> In Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15, the Court stressed the limited scope of Pierce, pointing out that it lent "no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society" but rather

> "held simply that while a State may posit (educational) standards, it may not pre-empt the educational process by requiring children to attend public schools." Id., at 239, 92 S.Ct., at 1545 (White, J., concurring). And in Norwood v. Harrison, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723, the Court once again stressed the "limited scope of Pierce," Id., at 461, 93 S.Ct., at 2809, which simply "affirmed the right of private schools to exist and operate ...." Id., at 462, 93 S.Ct., at 2809.

Id.

The state is accorded broad discretion in selecting a curriculum for its public schools. *Board of Education, Island Trees U.F.S.D., No. 26 v. Pico,* 457 U.S. 853, 863 (1982); *Meyer*, 262 U.S. at 402. If the school district has a rational purpose for its selection of curriculum, then the courts should not interfere. *Cornwell v. State Bd. of Educ.*, 314 F.Supp. 340 (D. Md. 1969), aff'd 428 F.2d 471 (4th Cir.), cert. denied, 400 U.S. 942 (1970); *see also Yoder*, 406 U.S. at 215, 92 S.Ct. 1526, 32 L.Ed.2d 15. Hence, the state may require that all children receive a minimum education, but cannot require that every child attend a public school. *See Pierce*, 268 U.S. at 534-35; *Stough v. Crenshaw County Bd of Educ.*, 579 F.Supp. 1091, 1093 (M.D. Ala. 1983). Contrary to Petitioners' assertions, no federal court has given parents the broad power Petitioners seek.

The jurisprudential conflict posited by Petitioners is a false one. The decisions of this Court and the Circuit Courts consistently limit the parental right to direct the upbringing of children to permit *reasonable* state regulation of education, particularly in the area of public school curriculum. *See, e.g., Pico,* 457 U.S. at 863; *Runyon,* 427 U.S. at 176-177, 96 S.Ct. at 2597-2598, 49 L.Ed.2d 415; *McCollum v. Board of Educ.*, 333 U.S. 203, 235, 68 S.Ct. 461, 477, 92 L.Ed.2d 649 (1948); *Pierce,* 268 U.S. at 534; *Brown v. Hot, Sexy and Safer Productions, Inc.,* 68 F.3d 525, 533 (1st Cir. 1995) *cert. denied* 116 S.Ct. 1044 (1996) (parents do not have a fundamental

right to dictate public school); *Murphy v. Arkansas,* 852 F.2d 1039, 1041-42 (8th Cir. 1988); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.,* 899 F.Supp. 1443 (M.D.N.C. 1995) (upholding mandatory community service program on rational basis test); *Mozert v. Hawkins County Board of Educ.*, 827 F.2d 1058, 1066-68 (6th Cir. 1987) *cert. denied* 484 U.S. 1066, 108 S.Ct. 1029 (1988).

Moreover, no decisions accord strict scrutiny review to school curriculum choice based upon a parental liberty interest. *See, e.g., Runyon,* 427 U.S. at 176-177, 96 S.Ct. at 2597-2598, 49 L.Ed.2d 415; *Pierce*, 268 U.S. at 535 (statutes had "*no reasonable relation* to some purpose within the competency of the State."(emphasis added)); *Meyer,* 262 U.S. at 403 ("the statute as applied is arbitrary and *without reasonable relation* to any end within the competency of the state" (emphasis added)); *Blackwelder v. Safnauer,* 689 F.Supp. 106, 135 (S.D.N.Y. 1988) (parents may not replace state educational requirements with their own idiosyncratic view of appropriate curriculum) *cert. denied,* 866 F.2d 548 (2d Cir. 1989).

Petitioners ask this Court to extrapolate from the holdings of *Pierce* and *Meyer* that there is a fundamental parental right to direct a child's education which triggers strict scrutiny review each and every time a parent disagrees with the school district's choice of curriculum. In any event, Petitioners' suggestion that the adoption of a "coercion" threshold will limit the number of cases falling within strict scrutiny review is simply wrong. (Pet. at 21). According to Petitioners' definition, coercion would be found in every instance where the completion of a particular course or program was a graduation requirement.

As a consequence, any high school graduation requirements, no matter how rooted in traditional educational practices, would come under attack. School districts would be effectively prevented from having minimum academic requirements. English literature is a required course in many school districts, therefore, under Petitioners' definition,

coercive, and subject to strict scrutiny. Similarly, the three years of mathematics required by most school districts would be coercive and thus subject to strict scrutiny. Term papers and physical education requirements would be coercive and thus subject to strict scrutiny. Basic computer literacy requirements would also be coercive and thus subject to strict scrutiny. The list is endless. This is not a mere "parade of horribles," this is the untoward consequence of according strict scrutiny review to local school district's choices of curriculum.

Having found that these courses fell within Petitioners' definition of "coercive," the courts would then have to evaluate the educational merits of each course to determine whether they were narrowly tailored to serve a compelling state interest. Not only is there no basis for Petitioners' coercion threshold, more important, there is no basis in Supreme Court jurisprudence for affording fundamental rights status to parental rights in the area of school curriculum.

II. THERE IS NO SPLIT IN JUDICIAL PRECEDENT REGARDING A SCHOOL DISTRICT'S AUTHORITY TO PRESCRIBE A REASONABLE CURRICULUM FOR ITS STUDENTS.

American public schools are charged with the high duty of educating the nation's children and preparing them to be useful citizens. *Pico,* 457 U.S. at 863; *see also Ambach v. Norwick,* 441 U.S. 68, 80 (1979) (state may introduce principles of responsibility and good citizenship).[6] It is well-settled that schools have broad discretion in matters of curriculum and that a local school board's choice of curriculum must not be set aside lightly. *Pico,* 457 U.S. at 863; *Runyon,* 427 U.S.

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[6] Indeed, in their discussion of the old state law cases on which they rely, Petitioners concede that, even at this time of supposedly unfettered parental rights, "students could not be exempted from classes deemed the 'essentials of good citizenship[,]" the very relief sought here. (Petition at 16).

160, 176, 96 S.Ct. 2586, 2597, 49 L.Ed.2d 415. "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint." *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968).

Not surprisingly parents may at times disagree with the institution of a particular course or curriculum chosen by the local school board. Parents may address their concerns to the local school board and urge other parents to do likewise. The Courts, however, should be circumspect in permitting such disagreements to merit judicial intervention. As this Court articulated over twenty years ago, "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations." *Yoder,* 406 U.S. at 215, 92 S.Ct. 1526, 32 L.Ed.2d 15.

A parent's right to bring up his or her child in accordance with his or her views has never been held to be coterminous with that parent's *desire* to exercise control over all aspects of a child's education. *See Runyon,* 427 U.S. at 176, 96 S.Ct. at 2597, 49 L.Ed.2d 415; *Pierce*, 268 U.S. at 534; *Murphy*, 852 F.2d at 1041-42; *Mozert*, 827 F.2d at 1066-68.

Both the District Court and the Court of Appeals noted that while parents have primary responsibility for the upbringing of their children, the state may enact reasonable regulations. "[W]hile parents have definite rights over their children's education, 'they have no constitutional right to provide their children with ... education unfettered by reasonable government regulation.' *Runyon,* 427 U.S. at 178 (emphasis added)." *Immediato,* 73 F.3d at 461. Attendant with the state power to regulate is the authority of local school districts to prescribe a reasonable curriculum for its students.

As the District Court noted,

> our nation has enjoyed a long history of encouraging families to take responsibility for the instruction of their own children, while at the same time,

> making school attendance compulsory and *granting control of the curriculum to state and local officials.* (emphasis added) *Immediato,* 873 F.Supp. 846, 849 (S.D.N.Y. 1995).
>
> ....
>
> parents may not use this Court to interpose their own way of life or their own philosophy, however laudable, as a barrier to reasonable state and local regulation of the educational curriculum. *Id.* at 853.

This Court has accorded fundamental right status to a limited range of uniquely personal and familial decisions which include abortion and contraception. *See Planned Parenthood v. Casey,* 112 S.Ct. 2791, 2805 (1992); *Carey v. Population Services Int'l,* 431 U.S. 678, 692-93 (1976). In addition, this Court has continued to recognize parental rights in the area of freedom of religion. *See, e.g., Yoder,* 406 U.S. at 223-26, 92 S.Ct. 1526. It is critical to note, however, that neither the decisions of this Court nor the decisions of other federal courts have ever permitted parental wishes to override a public school's choice of curriculum. *See, e.g., Pico,* 457 U.S. at 863; *Runyon,* 427 U.S. at 176-177, 96 S.Ct. at 2597-2598, 49 L.Ed.2d 415; *McCollum,* 333 U.S. at 235, 68 S.Ct. at 477, 92 L.Ed.2d 649; *Pierce,* 268 U.S. at 534; *Brown,* 68 F.3d at 533; *Herndon,* 899 F.Supp. 1443 (M.D.N.C. 1995) (upholding mandatory community service program on rational basis test); *Murphy,* 852 F.2d at 1041-42; *Mozert,* 827 F.2d at 1066-68.

The cases cited by Petitioners do not alter this result as those cases finding a fundamental parental liberty interest do not involve a public school's choice of curriculum. *Alfonzo v. Fernandez* was decided on the basis that the provision of condoms was a *health service* not an educational program. 606 N.Y.S.2d 259 (1993), *appeal dismissed without op.* 614 N.Y.S.2d 388 (1994). The *Alfonzo* decision cannot therefore be said to support a fundamental parental liberty interest sufficient to strike down a public school's curriculum. *Id.* Similarly, *Jordan by Jordan v. Jackson,* involved the right to have custody over one's children, which is an altogether different

issue from public school curriculum choices. 15 F.3d 333 (4th Cir. 1994). In *Ohio v. Wisner,* the Court struck down state regulations requiring a religious private school to strictly conform to public school curriculum finding that the regulations effectively abolished the distinction between public and private schools. 351 N.E.2d 750 769 (Ohio 1976). The state regulations in *Wisner* went so far as to require the use of certain texts and state certification of private school teachers. *Id.* The instant case is not about whether a private school must institute a community service program, but rather, whether a public school may constitutionally maintain such a program and make it a graduation requirement.

Petitioners ask this Court to reject well-settled precedent and renounce the traditional deference accorded to school districts in matters of curriculum and control of public schools. *See Pico,* 457 U.S. at 863; *Brown,* 68 F.3d at 533. The school district urges this Court to resist the temptation to overexpand parental rights into an area traditionally reserved to the sound discretion of a duly elected school board. In so doing, the school district asks that the Court follow a long line of Supreme Court cases and adhere to the limitations on parental rights which permit a school district to function. *See, e.g., Pico,* 457 U.S. at 863; *Runyon,* 427 U.S. at 176- 177, 96 S.Ct. at 2597-2598, 49 L.Ed.2d 415; *Epperson,* 393 U.S. at 104-05, 89 S.Ct. at 270, 21 L.Ed.2d 228; *McCollum,* 333 U.S. at 235, 68 S.Ct. at 477, 92 L.Ed.2d 649; *Pierce,* 268 U.S. at 534.

Relying on turn-of-the-century state cases, Petitioners suggest that this nation should return to the era of the late nineteenth and early twentieth century when, allegedly, parental rights were at their apex. The cases cited by Petitioners are unpersuasive. Many revolved around religion. *See, e.g., Hardwick v. Board of School Trustees,* 205 P. 49 (Cal.App. 1921) (Religious objection to dancing); *Hobbs v. Germany,* 49 So. 515 (Miss. 1909) (Religious objection to a school mandate that all homework be done between the hours of 7:00 p.m. and 9:00 p.m., where the child's family attended religious services during that time.); *People ex rel. Vollmar v.*

Stanley, 255 P. 610 (Colo. 1927). (Objection to the reading of the King James Bible during school hours). The few others involving secular objections are also readily distinguishable. For instance, in *State v. Ferguson,* for example, a 1914 decision from a Nebraska state court, a 12-year-old girl was permitted to be excused from a domestic science class, attendance at which required her to travel one and a half miles each way over and above her normal travel to and from school which caused her to fall behind in her other classwork. 144 N.W. 1039 (Neb. 1914). Indeed, there are numerous cases *rejecting* parental objections to curriculum.[7]

In addition, the cases cited by Petitioners are simply not reflective of modern public school education or modern state regulation. At the time these cases were decided, child abuse by parents, both physical and mental, remained largely unchecked and child labor laws were virtually unheard of.[8]

In urging this Court to maintain recognized limitations on the right of parents to control public school education, the school district does not seek to curtail any existing parental rights. The school district does contend, however, that the

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[7] *See, e.g., Cross v. Trustee Walton Graded Sch.,* 110 S.W. 346 (1908) (court held student's suspension for refusal, supported by parents, to participate in school play was proper and within school's authority to prescribe and enforce rules for control and management of the school); *State ex rel. Andrew v. Webber,* 8 N.E. 708 (1886) (court upheld expulsion of students who, at direction of father, refused to participate in a required music course); *Kidder v. Chellis,* 59 N.H. 473 (1879) (rejecting parents' and students' claim that they had a right to exclude student from "declaiming" in school and upholding student's expulsion); *State v. Mizner,* 50 Iowa 145 (1878) (court held that teacher was authorized to expel student who, pursuant to parents' direction, refused to study algebra); *Sewell v. Board of Educ. v. Defiance Union Sch.,* 29 Ohio 89 (1876) (court upheld student's suspension due to failure to participate in rhetoric class); *Ferriter v. Tyler,* 48 Vt. 444 (1876) (school board's power to determine curriculum and compel attendance overrides parent's power to determine what subjects children will study.)

[8] Subsequently, see Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1), c. 676 s. 3 52 stat. 1060 (June 25, 1938).

Court should be loath to overexpand the rights of parents by permitting them to substitute their own judgment for that of the local board of education in matters of curriculum. To do so would completely undermine the state's strong interest in educating its citizens.

A. An Opt Out Requirement Coupled with Strict Scrutiny Review of Public School Programs Will Require School Districts to Provide an "À La Carte" Curriculum Which Will Undermine Rather than Promote the States' Legitimate Interests in Education.

As discussed above, Petitioners argue that the this Court should hear this case so that it may clarify a parent's fundamental right to control "coercive" elements of a public school curriculum. According to Petitioners, that portion of a curriculum that involves more than just "exposure" and entails some form of "action" on a student's part, particularly where the "action" takes place outside of school, is inherently coercive such that it is presumptively subject to a parental veto or opt-out. Petitioners' "exposure/action" rule has no foundation in law and is otherwise illogical.

In the first instance, "exposure" itself, which arises out of compulsory attendance, is inherently "coercive" and nonetheless plainly constitutional. *Epperson*, 393 U.S. at 104-05, 89 S.Ct. at 270, 21 L.Ed.2d 228. More important, every course in a public school which requires homework by definition coerces action outside of school and therefore would be subject to strict scrutiny under Petitioners' proposed standard.

Indeed, under Petitioners' reasoning, every science course which entails laboratory experiments goes beyond mere exposure and would therefore automatically infringe upon a parent's fundamental liberty interest. Similarly under Petitioners' proposed standard, while a public school may expose a student to art, physical education and history, it may not require that a student draw, paint, actually participate in a gym class or prepare a history paper from sources available at a public

library. Thus, under Petitioners' "exposure/action" model, any course which involves more than passive listening to a teacher (although listening and taking notes are in themselves "action"), would be subject to a parental veto. Accordingly, the exposure/action distinction in the educational setting was properly rejected by the Second Circuit as being a distinction without a meaningful difference and does not warrant review of this case by this Court.[9]

Petitioners also seek strict scrutiny for any course which teaches values to a student which that student's parents want to instill in the student themselves.[10] Indeed, the thrust of this litigation is not that the Petitioners disagree with the educational purpose of the community service program, but rather that the parents want to teach good citizenship to their child themselves. Thus, under Petitioners' reasoning, if a parent wishes to instill in his/her child an appreciation for art, music, literature or sportsmanship and believes that appreciation

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[9] Petitioners' reliance on *Curtis v. School Committee of Falmouth*, 420 Mass. 749, 652 N.E.2d 580 (1995) *cert. denied.* 116 S.Ct. 753 (1996) is unavailing. In *Curtis*, the parent-plaintiffs were not challenging a mandatory course requirement for graduation, but rather were challenging a public school district's decision to make birth control devices readily available to students. As discussed above, the fundamental liberty interest which attaches to personal choices over birth control does not logically give rise to a similar liberty interest in the area core curriculum and educational requirements. In any event, Petitioners are asking this Court to hear this case based upon a case which rejected a parental challenge under facts which are far more compelling than those herein.

[10] In contrast with the case at bar, cases finding that the government unconstitutionally required a person to perform an act are based upon the Free Exercise Clause. *See, e.g., Thomas v. Review Board,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (Jehovah's witness who refused to work on military tanks); *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (sabbatarian who refused to work on Saturdays); *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed.2d 1628 (1943) (Jehovah's witness who refused to salute flag and pledge allegiance); *Spence v. Bailey,* 465 U.S. 797 (6th Cir. 1972) (public education conditioned on ROTC military training contrary to religious beliefs).

should not come about through forced study or participation from a school district, that parent has a fundamental right to opt-out of any course involving those subjects.

Petitioners thus ask this Court to turn mandatory educational requirements at the high school level into a pick and choose curriculum with no enforceable minimum requirements. The relief which the Petitioners seek would unquestionably leave public school's at the mercy of each and every parent in the District who either disagrees with the school's required courses or agrees with the educational purpose of those courses but nonetheless wants to opt-out so that he or she may in essence self-teach that course. The chaos that would result under Petitioners' system of education has been recognized and wisely rejected by this Court: "If we are to eliminate everything that is objectionable to any [parent] or inconsistent with [that parent's personal beliefs], *we will leave public schools in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant suits*." *McCollum*, 333 U.S. at 235, 68 S.Ct. at 477, 92 L.Ed.2d 649 (Jackson, J. concurring) (emphasis added); *see also Brown*, 68 F.3d at 533 (parents do not have a "fundamental right to dictate the curriculum at the public schools to which they have chosen to send their children ... If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum to each student whose parent had genuine moral disagreements with the school's choice of subject matter. We cannot see that the constitution imposes such a burden on state educational systems...").

In short, the relief which Petitioners seek is unprecedented, unwarranted, unworkable and has been uniformly rejected by all courts which have had occasion to address the issue.

The community service requirement, which has already been approved by the New York State Commissioner of Education,[11] is reasonably based upon a well-founded educational

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[11] *Appeal of Anne O'Neill*, 29 Ed.Dept.Rep. 297 (1990).

goal. Following a review of other districts programs, New York State Department of Education syllabi, and the Commissioner of Education's opinion, the school district and the Board of Education determined that "Managing Your Future" was a valuable educational course. The Court may share Petitioners' distaste for performing the community service component of the school district's course, however, the Court must defer to the sound discretion of the local school board in matters of curriculum where the prescribed course or materials are rationally related to an educational purpose.

III. THE COMMUNITY SERVICE PROGRAM DOES NOT UNCONSTITUTIONALLY INFRINGE ANY PERSONAL LIBERTY INTEREST OF STUDENTS

The community service program presents no unconstitutional infringement of any fundamental personal liberty interest of students. Compulsory education has long been held to be constitutional. *Epperson,* 393 U.S. at 104; *Pierce*, 268 U.S. at 534-35; *Concerned Citizens for Neighborhood Schools v. Board of Educ. of Chattanooga,* 379 F.Supp. 1233 (E.D.Tenn. 1974). The limitation, if any, on Daniel's personal liberty is minimal compared with the limitation imposed on Daniel's liberty by school attendance itself. This Court held in *Meyer* that,

> Without a doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness of free men. *See Meyer*, 262 U.S. at 399 (1922).

Nowhere does *Meyer* intimate that liberty includes freedom from reasonable homework or out of classroom assignments. Students are only required to perform 40 hours of community

service over the course of four years. Even if a student chooses to do all of the community service in one year, the time required amounts only to approximately 90 minutes per week, which is hardly an unreasonably burdensome requirement. Moreover, the New York State Commissioner of Education determined that community service programs served a valuable educational purpose. In *O'Neill,* the Commissioner held,

> I also find that respondent's policy is reasonable in that it will benefit students in their postgraduation endeavors (*See, Matter of Yanson,* 22 Ed.Dept.Rep. 319, 321, *supra*). Community service offers an enriching educational opportunity, both in terms of the values it can engender and the experience it provides. I encourage respondent, and other school districts in this State, to pursue this laudable practice. 29 Ed.Dept.Rep. at 299.

Far more substantial limitations on student liberty interests have been held constitutional by this Court. *Ingraham v. Wright*, 430 U.S. 651, 668-69 (1977). In *Ingraham*, this Court upheld the infliction of corporal punishment in disciplining school children. 430 U.S. at 668-69. The Court noted,

> [w]e have repeatedly rejected 'the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the Due Process Clause' .... we must look not to the 'weight,' but to the *nature* of the interest at stake. [citations omitted] Id. at 672. (emphasis added).

The extent of the infringement, if any, must be balanced with the importance of the liberty interest sought to be protected. Although the state must demonstrate a compelling state interest to justify interference with very strong liberty interests such as the right to the free exercise of religion and the right to abortion, *see Casey*, 112 S.Ct. at 2805; *Yoder*, 406 U.S. at 223-26, the personal liberty interests claimed by Petitioners have never been recognized by any court as requiring a student to be excused from reasonable educational requirements

of a public high school. *See, e.g., Pierce,* 268 U.S. at 534; *Brown,* 68 F.3d at 534; *Null v. Board of Educ.*, 815 F.Supp 937 (S.D.W.Va. 1993). As a result, the school district's mandatory community service requirement is subject only to a reasonableness test. *See San Antonio School District v. Rodriguez*, 411 U.S. 1, 35 (1972); *Blackwelder*, 689 F.Supp. at 136 (N.D.N.Y. 1988), *cert. denied,* 866 F.2d 548 (2d Cir. 1989). Nevertheless, Petitioners ask this Court to reject settled precedent and to create a blanket liberty interest shielding students from any activities with which students or their parents disagree on secular grounds. Petitioners' arguments are not supported by federal precedent and are not worthy of review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PLUNKETT & JAFFE, P.C.
*KEVIN J. PLUNKETT, ESQ.
PHYLLIS S. JAFFE, ESQ.
ELIZABETH S. TORKELSEN, ESQ.
HOWARD M. MILLER, ESQ.
1 North Broadway
White Plains, N.Y. 10601
(914) 948-7722

Counsel for Respondents

**Counsel of Record*

Dated: June 15, 1996

APPENDIX

What Did You Gain From Your Community Service?

1994

Community Service Responses 1994

I learned that you can make a difference in other peoples' lives by helping out. I learned about responsibility and felt good about myself. * * *

Learning to give back to the community. Learning to work as a team(cooperation) to get bigger things done faster. The realization that I am lucky to be living in this community and there are many people worse off than me. * * *

I gained a great sense of pride in getting the job done and helping to keep the environment a little cleaner. I also found out that I was capable of leading a group of people through a task of my own design. * * *

Responsibility and experience * * *

I gained a lot from this. I learned to be more responsible. I would be responsible to watch the children and to make sure they don't get hurt. I would be responsible to make sure that they go home with their parents. * * *

Humanitarian effect and gratitude for my health and personnal [sic] skills. * * *

I learned what the hospital environment is like and if I'd like to be in it as a career, and I've been around sick people, and would like to help them. I Interned with nurse and I see what things they do, like observing the patient, giving medication, doing I.V.'s, and other varied things. I realized that this is one of my goals in life-to be a successful nurse. * * *

I could say I got satisfaction because when I helped the elderly that got very happy. * * *

I have learned that people who are homeless are not always crazy or dirty as they are typically portrayed in the media. I

have learned that by helping others you can better yourself. * * *

I gained pride in my church to a greater extent and felt good for doing a favor for someone without being paid. Those are my honest feelings. * * *

It feels good to help people who need help. * * *

Respecting people, how a hospital is run, taking a major responsibility for other people. Learning risks, keep alert, and a good feeling about myself. * * *

From this experience I gained some knowledge on the the computor, but most of all I learned how to deal with children a lot better. I learned how to handle them, control them and make them want to learn. * * *

It is hard to say exactly what I learned. I am overwhelmed with happiness at the sight they get watching us sing. They all love us and have to be around young people. I love to sing and would sing for anyone any time. Its for me too, I feel very bad for them and I am glad to have "made their day". * * *

I gained the knowledge that working with people is a factor that I like about any job. Ushering gave me a sense of what ist is to serve people, and singing for an audience, a sense of performance in the art world. The hospital experience will also help me decide which science profession to pursue. * * *

Knowledge on how to keep a shop from going out of business, for example, it has to have regular opening hours, and good reliable works that do not give away the profits. * * *

An advanced outlook on my community and the technical skills which are available to me. How to work with people better, care for them, teach them.

I gained from this service how firemen work so hard and the good and bad of the job. * * *

I gained self-advocating skills and I gained a lot from the complaints. * * *

I gained an appreciation of how hard the athletes had to work. They had to work twice as hard as any other non-handicapped athlete. * * *

I have gained much from this experience in all fields as well as social structure in the area of asking for what is needed in life and as well as a job in the world of work. * * *

From this I gained more respect for elderly and I now realize how its not going to be easy for anyone in the future. With good health, everyone grows old. And the person who I met, and went back to meet two times after I originally met her, was in great health for 86 and I wish to be so healthy and happy in my elder years. * * *

This service made me feel happy because I know I was helping someone to understand how to do their work better. They were grateful for this and it made me feel good. * * *

I learned a lot about about many different types of animals. I learned how to take care of over 40 different animals, and their habits. I learned how to better relate with people and calm people who were frightened by certain animals. I enjoyed what I did. * * *

I learned that it is important to recycle because it is important and it saves a lot of time. I love helping the environment. * * *

I learned there are many capable individuals and all they need is a little help to succeed. It is a great feeling to help someone and see the "hands on" or actual results. * * *

I gained responsibility and a good feeling inside. I felt I gave back to the community. * * *

I gained a lesson from helping elderly people in there [sic] needs. * * *

I learned about lighting technique. People lighting, for certain scenes, and how to back up lights without starting fires or causing accidents. * * *

That It can be fun working with children.And know how they behave. * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

DANIEL IMMEDIATO, a minor, by DIANE and EUGENE IMMEDIATO, as Guardians, and in their own right, and MARIO GIRONDA, JR., a minor, by MARIO and SANDRA GIRONDA, as Guardians, and in their own right,

Plaintiffs,

- against -

RYE NECK SCHOOL DISTRICT; KATHLEEN D. GULOTTA, FRANK SPEDAFINO, BEATRICE CERASOLI, ALAN MANOCHERIAN, JANICE K. ANDERSON, LIZ PERELSTEIN, in their official capacities as members of the Rye Neck School District Board of Education; and PETER J. MUSTICH, in his official capacity as Superintendent of Rye Neck School District,

Defendants.

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DEFENDANTS' RESPONSE TO PLAINTIFFS' INTERROGATORIES

94 Civ. 2831 (CLB)

Defendants, by their attorneys, Plunkett & Jaffe, P.C., hereby respond to the interrogatories of Plaintiffs. Defendants reserve the right to amend these interrogatory answers should new facts or evidence become apparent.

Defendants object to plaintiffs' interrogatories to the extent that they are in violation of Rule 46 of the Civil Rules of the

United States District Courts for the Southern and Eastern Districts of New York as said rule applies to the Southern District and reserve their rights pursuant to said rule.

INTERROGATORY 1

1. (a) State in detail the educational interests or purposes of the mandatory community service program when it was first introduced into the curriculum and any subsequent modification or amendment of those interests or purposes.

(b) Identify all documents on which Defendants relied in formulating, modifying or amending the educational interests or purposes of the mandatory community service program.

(c) Recount the sequence of board meetings, if any, in which those interests or purposes were discussed, including the date, time, length, attendance, and speakers at the meeting and any votes taken.

RESPONSE:

1.(a) The community service program was developed in relation to the required senior history course on government. Its purpose was to have students learn about the community and the needs of the community, to learn what services are necessary to meet the needs of the community and its citizens, to meet people and see what they do and, if possible, to become involved in internships with government officials and agencies. In addition, students were urged to do research and turn in reports on the field in which they volunteered; for example, to do a report on alternatives for the care of the aged. When the community service program was incorporated into a course entitled "Managing Your Future" the community service was also intended as a bridge between school and work or school and college. Students had to learn to make a commitment, to arrive as promised, to dress appropriately and to work with other people as well as being given an opportunity to look at possible careers. The other educational aspects of "Managing Your Future" are on a document entitled "Managing Your Future Curriculum," one of the documents

produced in response to Plaintiffs' First Set of Requests for Production of Documents.

(b) See documents provided in response to Plaintiffs' First Set of Requests for Production of Documents.

(c) Board minutes do not normally record discussions nor the time and length of such discussions, nor the particular speakers. Reports of the Superintendent of Schools are normally recorded as at the Board of Education meeting of February 28, 1990 (document provided in response to Plaintiffs' First Set of Requests for Production of Documents).

INTERROGATORY 2

To the extent the interests or purposes were not officially developed at school board meetings, describe in detail when, how, and by whom they were developed.

RESPONSE:

2. The community service program and the course "Managing Your Future" were developed by review of a New York State Education Department syllabus on Community Service/Internship Model, a review of the programs in other school districts and states, a review of a decision of the New York State Commissioner of Education encouraging school districts in New York State to adopt such programs, and a perceived need to have students, particularly seniors, move into the outside world. The program was developed by then High School Principal Howard Storm, history teacher Peter Sgroi, guidance counselor Adrienne Dammacco, and present High School Principal Dr. Barbara Ferraro.

INTERROGATORY 3

3. State whether, and describe in detail how, the mandatory community service program is necessary to fulfill the educational interests or purposes stated in response to Interrogatory No. 1(a).

RESPONSE:

3. Through the contribution of their time and skills, the students become aware of the varied social, educational, and economic needs of both their community and school. Participation in the service program enhances the students' awareness of these needs, how needs can be met, and the opportunity to give a "hands-on" response to what they encounter. In giving a helping hand, the students move from the theoretical position of awareness of a problem and into the real possibility of doing something about it. The normal classroom procedure does not always allow this possibility. Community service helps provide the student with a chance to enhance their own self-esteem, contact with a distinct career possibility, activities for their college applications and a training ground for job opportunity.

INTERROGATORY 4

Describe in detail how the mandatory community service program -- particularly its requirements that the work students perform be unpaid and involve providing service to community organizations -- is a "vital ingredient" of a course intended as a school-to-work or school-to-college transition.

RESPONSE:

4. In order for students to learn about the community they must go out into the community. The organizations to which students provide services are a major component of any community as are government offices and agencies. The program was not intended to take jobs away from others nor was the school prepared to demand of its students that they obtain paying jobs.

INTERROGATORY 5

5. Identify any school districts, outside experts, or specialists consulted by Defendants in drafting, modifying, or amending the mandatory community service program.

RESPONSE:

5. See the documents produced in response to Plaintiffs' First Set of Requests for Production of Documents, numbers 1, 2 and 3.

INTERROGATORY 6

6. Describe in detail any procedures, tests, informal reviews, or other means of evaluation used to measure and analyze what students allegedly gain or learn from the mandatory community service program and the results of such evaluation.

RESPONSE:

6. Students are required to report on what they have done during their community service and in some cases to prepare reports after research. Speakers from various agencies are from time to time brought in to discuss further the policy implications of the work of their agencies. See document entitled "What Did You Gain From Your Community Service?" in response to Plaintiffs' First Set of Requests for Production of Documents.

INTERROGATORY 7

7. Describe in detail any procedures, tests, informal reviews, or other means of evaluation used to measure and assess the success or failure of the mandatory community service program in fulfilling the educational interests or purposes of the program stated in response to Interrogatory No. 1(a).

RESPONSE:

7. See response to 6 above. In addition, the ability of the students to complete the material required for "Managing Your Future" reflects what they have learned during their community service.

INTERROGATORY 8

8. Describe in detail the eligibility criteria of nonprofit or charitable organizations in which students wish to perform service for credit under the mandatory community service program, including how and by whom these criteria were developed.

RESPONSE:

8. The not-for-profit or charitable organizations in which students perform service are standard agencies, recognized in the community, or government officials or agencies, including the Rye Neck School District.

INTERROGATORY 9

9. (a) State whether students have been denied credit or approval for any community service activities they have performed or proposed.

(b) If so, for each denial, identify the type of service activity and the name of the organization for which the student was denied credit, the basis for denial, and the person(s) who denied credit for the service.

RESPONSE:

9.(a) Students would only be denied credit if their activity has not been pre-approved which may occur if the agency or organization does not meet the criterion of not-for-profit or charitable.

(b) See responses to interrogatories 10 and 12 below.

INTERROGATORY 10

10. (a) State whether any student has inquired about service activities for credit and been informed that certain types of service or certain organizations were ineligible for credit under the mandatory community service program.

(b) If so, for each such incident, identify the type of service activity and the name of the organization ineligible for credit,

the basis for the ineligibility, and the person(s) who made the decision.

RESPONSE:

10.(a) and (b) The only two occasions in which students have been told that their proposed service was ineligible for credit in the memory of school staff are (1) a student who wished to work in his father's store and (2) a student who was to be paid for babysitting. In addition, see response to interrogatory 12 below. Adrienne Dammacco is the staff member who pre-approves community service.

INTERROGATORY 11

11. Describe in detail the mandatory community service program's requirement stated in paragraph 9 of the Answer that student service activities may not replace work for which payment is made, including explanation of how, why, and by whom this requirement was developed.

RESPONSE:

11. The requirement that student service activities may not replace work for which payment is made is set forth in the syllabus of the New York State Education Department.

INTERROGATORY 12

12. (a) Describe in detail the standards and procedures that govern whether service performed for religiously-affiliated institutions or organizations is eligible for credit under the mandatory community service program.

(b) If any religiously-affiliated activities have been accepted or rejected under the mandatory community service program, identify the institution, organization, and type of service activity accepted or rejected.

RESPONSE:

12.(a) Service performed for religiously-affiliated institutions or organizations is approved when the activity involves,

for example, clothing drives and food drives including students making sandwiches for the midnight run to New York City to provide food to homeless persons. Service such as proselytizing on the street or door to door in favor of a particular religion would not be approved.

(b) A student who was a member of Jehovah's Witnesses asked to receive credit for proselytizing, which was denied. He later received credit for participating in the midnight run to New York City.

INTERROGATORY 13

13. (a) Identify all organizations and agencies that have requested service of students as stated in paragraph 9 of the Answer.

(b) If any organizations or agencies that have requested service of students have been denied such service, identify those organizations or agencies and state in detail the basis for denial of student service to those groups.

RESPONSE:

13.(a) Organizations and agencies that have requested service include the United Hospital of Port Chester, the Village of Mamaroneck, the Sara Newman Nursing Home, the Greenburgh Nature Center and the Multiple Sclerosis Society. In addition, see documents produced under Plaintiffs' First Set of Requests for Production of Documents.

(b) No organizations or agencies that have requested service of students have been denied such service in the memory of staff members.

INTERROGATORY 14

14. (a) State whether suggestions are made to students about what service activities are available or appropriate under the mandatory community service program.

(b) If so, identify the person(s) who make these suggestions, the process for deciding which service activities will be

suggested to students, and how these service opportunities are made known to the students.

RESPONSE:

14.(a) Service activities that are sought are listed on bulletin boards and read to senior homerooms. See documents produced pursuant to Plaintiffs' First Set of Requests for Production of Documents.

(b) The staff member responsible for informing students of available opportunities for service is Adrienne Dammacco. All activities of standard organizations in the community, all requests, for example, for tutoring services, are eligible and are suggested to students and made known to them, as indicated above, through the use of bulletin boards and information provided in homerooms.

INTERROGATORY 15

15. Describe in detail how students must verify to the school the service hours they perform in order to receive credit toward completion of the requirements of the mandatory community service program.

RESPONSE:

15. Students must fill out a form indicating the service they have performed, where, the name and telephone number of their supervisor at the agency or organization. All such reports are checked with the agency's supervisor by Adrienne Dammacco.

INTERROGATORY 16

16. State the number of service hours that must be performed by students in service other than to the school system stated in paragraphs 1 and 8 of the Answer.

RESPONSE:

16. Students must perform 20 hours of service other than to the school system although, in a special case, an exception may be made.

INTERROGATORY 17

17. Describe in detail the procedures to guarantee the confidentiality of the service performed by students under the mandatory community service program.

RESPONSE:

17. Students report on the service they have performed. However, students are not asked why they selected a particular service, whether they had a particular motivation for picking that service or whether they are in agreement or disagreement with the aims of the organization. They are only asked what service they performed and what they learned from it.

INTERROGATORY 18

18. Describe in detail the format, objectives, and requirements of the course, "Managing Your Future," including the manner in which student service activities are discussed by the students and teacher in the class and incorporated into the coursework.

RESPONSE:

18. In regard to the format, objectives and requirements of the course, "Managing Your Future," see the documents produced headed "Managing Your Future Curriculum" and the forms attached in response to Plaintiffs' First Set of Requests for Production of Documents. Student service activities may be discussed by the students and, as indicated, speakers from the various agencies may come to class to discuss further the work of the agencies.

INTERROGATORY 19

19. Identify all Rye Neck School District personnel responsible for administering the mandatory community service program and their specific duties.

RESPONSE:

19. Peter Sgroi teaches the course "Managing Your Future." Adrienne Dammacco is responsible for supervising the service activities and for contact with agencies and parents. Dr. Barbara Ferraro, High School Principal, has responsibility for overall supervision of high school programs.

INTERROGATORY 20

20. Identify all persons that currently are members of the Rye Neck School District Board of Education, and identify all persons that were board members at the time that the mandatory community service program was adopted.

RESPONSE:

20. Present members of the Board of Education of the Rye Neck School District are Kathleen Gulotta, Alan Manocherian, Janice Anderson, Liz Perelstein, Leonard Tallevi, Robert Frankel. Board members at the time the community service program was adopted were Beatrice Cerasoli, Miles Federman, Kathleen Gulotta, Robert Reich, Francis Spedafino, Stewart Sterk.

Dated: White Plains, New York
July 18, 1994

/s/ Phyllis S. Jaffe

Phyllis S. Jaffe (PJ7584)
PLUNKETT & JAFFE, P.C.
Attorneys for Defendants
1 North Broadway
White Plains, New York 10601
(914) 948-7722

To: Lance J. Gotko, Esq.
Attorney for Plaintiffs
875 Third Avenue, 8th floor
New York, New York 10022
(212) 833-1115

Scott G. Bullock, Esq.
Institute for Justice
Attorneys for Plaintiffs
1001 Pennsylvania Avenue, N.W.
Suite 200 South
Washington, D.C. 20004
(202) 457-4240

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No. 95-1861

In The

Supreme Court of the United States

October Term, 1995

DANIEL IMMEDIATO; DIANE IMMEDIATO; AND EUGENE IMMEDIATO,

Petitioners,

v.

RYE NECK SCHOOL DISTRICT; KATHLEEN D. GULOTTA; FRANK SPEDAFINO; BEATRICE CERASOLI; ALAN MANOCHERIAN; JANICE K. ANDERSON; LIZ PERELSTEIN; PETER J. MUSTICH,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONERS' REPLY BRIEF

LANCE J. GOTKO
875 Third Avenue
8th Floor
New York, New York
10022
(212) 833-1115

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
CLINT BOLICK
*SCOTT G. BULLOCK
1001 Pennsylvania
Avenue, NW
Suite 200 South
Washington, DC 20004
(202) 457-4240

*Counsel of Record

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. PARENTAL LIBERTY

In its opposition to the Immediato family's petition for a writ of certiorari, respondent Rye Neck School District ("the school district") seeks an iron-clad rule in regard to Fourteenth Amendment parental liberty claims: once a "rational" educational purpose has been established for a program, then parents and students have no recourse but to abide by the edicts of the officials or suffer the consequences. *See* Respondents' Opposition ("Respondents' Opp.") at 5-6, 17. Adoption of rational basis review for parental liberty claims would virtually eliminate the ability of parents to challenge public educational programs that violate their right to direct their children's education. Moreover, such a standard contradicts the special place of the family and parents under the Constitution.

The Immediatos, a family challenging the ability of the school district to conscript their son to volunteer, set forth in their petition the uncertainty in the law and conflicts in the courts concerning the nature of parental liberty rights under the Fourteenth Amendment. Petition at 9-12. They further document that while the law may currently be uncertain, this Nation's history and traditions demand that the right of parents to direct the upbringing and education of their children be affirmed as fundamental. *Id.* at 12-18.

The school district assiduously avoids addressing the primary issue in the instant case: whether the right of parents to direct the education of their children is a fundamental or a non-fundamental right. Perhaps the school district recognized that it would be difficult to counter the overwhelming evidence from history and case law recognizing parental right as one of the primary foundations of our society. Instead, the school district devotes almost its entire opposition brief to one of the most time-honored arguments against the assertion of parental rights in the public school setting. An acceptance of petitioners' argument, it claims, would open up a

Pandora's Box of unlimited parental and court meddling, thereby paralyzing the ability of public schools to determine their policies.

Not only are such arguments alarmist and hyperbolic, they evade the central question in the Immediatos' petition: is their right to direct their son Daniel's education a fundamental right? Government officials can violate parental rights in myriad ways, whether through overly intrusive regulation of private or home schooling, or through public school programs that usurp authority from parents in areas traditionally left to family decision-making. The school district attempts to avoid these issues by narrowing the issue to whether parents can challenge public school curriculum choices. Respondents' Opp. at 6-8. The school district cites a conflicting body of case law in support of its argument that parental rights have never been and cannot be protected in the public school setting. However, the primary cases upon which the school district relies involve either home schooling or private schools, not public education disputes.[1]

The primary issue in all recent parental liberty cases, whether they involve home schooling, private schools, or

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[1] For instance, *Runyon v. McCrary*, 427 U.S. 160 (1976), the main case relied upon by the school district for its contention that parents cannot challenge a public school program, did not involve public education at all. Rather, it involved whether parents had a "constitutional right to provide their children with *private* education unfettered by reasonable government regulation." *Id.* at 178 (emphasis added); *see also Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988) (addressing right of parents to homeschool child without *any* government regulation); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 135 (N.D.N.Y. 1988) (challenge by home schooling parent to state regulation). Of course, petitioners, unlike the parents in *Runyon*, *Murphy*, and *Blackwelder* do not argue that the government can play no role in the education of their children, but rather challenge an overextension of public school authority into family matters.

public education, is the proper characterization of parental liberty rights, an issue upon which there is no clear guidance from this Court. *See* Petition 9-12. It is this issue that must be resolved before turning to the question of how parental liberty rights should be construed in the public school setting.[2]

As set forth in the petition (at 6-9), public schools have recently become enmeshed in areas traditionally left to parental authority, and numerous, albeit conflicting, decisions have been handed down in the past several years construing parental rights in the public schools. *See also* Rutherford Institute ("Rutherford Inst.") *Amicus* Brief in Support of Petition at 9-10.[3] The Immediatos recognize

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[2] Indeed, it is at this point somewhat premature to address the standards and tests that should be used when parents argue that public school programs violate their right to direct their children's education. First, this Court must decide whether parents even have a fundamental right to direct their children's education, whether it be at home, in a private school, or in the public schools. Petitioners set forth some of the issues concerning public school disputes in order to counter the mischaracterizations made by the court below and the school district. *See* Petition at 20-24.

[3] In its discussion of recent cases that involve parental rights in the public school setting, the school district blatantly mischaracterizes their rulings, claiming that both cases involve issues outside of educational policy. *See, e.g., Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580 (1995), *cert. denied*, 1116 S.Ct. 753 (1996) and *Alfonzo v. Fernandez*, 606 N.Y.S.2d 259 (1993), *appeal dismissed without op.*, 614 N.Y.S.2d 388 (1994); Respondents' Opp. at 11, 15. However, the courts in these cases made clear that they were reviewing the condom distribution programs as part of a public school educational program, not, as the school district contends, as a "health" policy. *See Curtis*, 652 N.E.2d at 584; *Alfonzo*, 606 N.Y.S. at 265-67. Both condom distribution programs and mandatory service programs represent instances of public schools going further than they have ever gone in the past, intruding into areas traditionally left

that public schools normally have discretion to determine their curriculum, and in no way wish to interfere with the ability of public schools to impart necessary skills and knowledge to their children or any others. Accordingly, the test set forth by the Immediatos for protecting parental rights in the public school setting provides a workable balance between public school authority and parental rights.

The school district misstates these threshold issues and claims that mere recognition of parental rights in the public schools would subject each and every aspect of the public school curriculum to strict scrutiny review. Respondents' Opp. 8. However, as set forth in the petition, before a court would even adopt strict scrutiny to mandatory service programs or any other public school requirement, parents must demonstrate that the program violates their right to direct their children's education. Petition at 20-24. First, parents would have to demonstrate that a program was coercive. Secondly, to violate parental liberty, a program would have to force young people to perform actions and participate in programs as opposed to merely exposing them to objectionable values and beliefs. Lastly, parents would have to demonstrate, as required under the common law, that the program from which the student would be exempt was not an essential of good citizenship and that the exemption would not interfere with the administration of the public schools. Only after parents meet these threshold requirements

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to parental authority. Furthermore, both programs have little connection to the traditional school curriculum; most condom distribution programs have some relation to the school's interest in health education while the school district's service program has a tenuous connection to the class, "Managing Your Future." *See* Petition at 3. The school district's program should be analyzed under the parental liberty standards set forth in *Curtis*, *Alfonzo*, and other cases involving intrusions by public schools into family autonomy.

would strict scrutiny and a narrow tailoring test apply to parental liberty claims.

The school district asserts that both the coercion requirement and the exposure/action rule provide no limit on parental rights claims in the public schools. As the Supreme Judicial Court of Massachusetts recognized in *Curtis*, however, the coercion requirement plays an important role in determining whether public school authority violates parental rights. Under the rule, only school programs that provide no outlet for parents and result in a sanction or expulsion violate parental rights. *Id.*, 652 N.E.2d at 586.

After declaring the coercion requirement unworkable, the school district then marches out a typical "parade of horribles," claiming that if petitioners' arguments were accepted, students could opt out of any educational requirement, including English and math classes. Respondents' Opp. at 8-9. It would be quite difficult to conjure up a sincere, values-based parental objection to the traditional public school curriculum. Nevertheless, even assuming that a parent would object and file a lawsuit over their child learning how to read or perform math problems, the school district ignores the common law rules for parental liberty claims in the public schools: students cannot be exempt from "the essentials of good citizenship" and the exemption cannot interfere with the administration of the public schools. These important limiting factors would make it extremely difficult for parents to successfully challenge educational basics.

Similar alarmism pervades the school district's discussion of the "exposure/action" rule. In the same manner the school district expands the definition of "curriculum" to the breaking point, so too does it attempt to expand the definition of action to include virtually anything undertaken by students. Even the court in *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1064-65 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988), however, distinguished between traditional classroom activity such

as reading books and test taking (which were acceptable) and true "acts," such as participating in a school play (which were not). *See* Petition at 21-23. Moreover, the school district admits that the exposure/action test is employed regularly in free exercise cases apparently without destroying the public schools or interfering with other governmental policies. *See* Respondents' Opp. at 15. When distinguished from the absurd examples provided by the school district, the exposure/action rule is an important mechanism to ensure protection of parental liberty in the public schools, while still allowing school officials to further their educational interests.[4]

In addition to mischaracterizing the legal standards in the instant case, the school district throughout its opposition paints a picture of parents that has little relation to the vast majority of parents whose children attend public schools. If the school district were to be believed, parents are forever waiting to find some excuse to deny their children the opportunity to learn, and consequently run to court to challenge every public school program. This caricature of parenting is unfair and irresponsible. As noted in the Immediatos' petition (at 6-9, A-64-69) and the Rutherford Institute's *Amicus* Brief (9-10), current values disputes between parents and public schools arise primarily because many school officials insist on

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[4] The Immediatos also documented in their petition the fact that common law decisions recognized the rights of parents in the public school setting, and, indeed, these early decisions served as a basis for this Court's landmark trilogy of parental liberty decisions in the 1920s. Petition at 16-17. These decisions and subsequent cases enforcing parental rights contradict the school district's assertion that the remedy sought by petitioners is unprecedented. The remedy sought by the Immediatos and other parents is nothing more than the recognition of their long-standing rights at a time when such rights are under attack by educational officials throughout the nation. *See* Petition at 6-9; Rutherford Inst. *Amicus* Brief at 9-10.

assuming responsibilities that have traditionally been left to parents. It is therefore imperative that parental rights be preserved in the public school setting.

The school district also does not address the alternative to affirming parental rights as fundamental: relegating this right to non-fundamental status. The school district argues that if educational programs usurp parental authority, school officials need only point to a "rational" educational objective for the program to be sustained. Respondents' Opp. at 17. As set forth in the petition (at 18-19), adoption of rational basis review for parental liberty claims will leave parents with no recourse. Public school officials, under rational basis review, can adopt virtually any requirement, and parents cannot object so long as the school district can point to a reasonable educational objective for the program. The primacy of the family under our system of law simply does not allow such an incredibly deferential standard when public school programs intrude into family matters.

The Second Circuit below declared that in the interest of judicial self-restraint, it would not "break new ground" by recognizing parental liberty as a fundamental constitutional right. *Immediato v. Rye Neck School District*, 73 F.3d 454, 461 (2d Cir. 1996). In fact, the court had it exactly backward: the school district in the instant case, like a growing number of school districts, has broken new ground by intruding into the private realm of the family. The Immediatos seek only to restore a right central to our Nation's history and traditions – the right of parents to have primary responsibility over the education of their children. Accordingly, the Immediatos urge this Court to grant their petition in order to determine whether parental liberty rights will be enforceable in modern educational disputes.

II. PERSONAL LIBERTY

The school district misstates petitioners' Fourteenth Amendment personal liberty claim, suggesting that it

attempts to "create a blanket liberty interest shielding students from any activities with which students or their parents disagree. . . . " Respondents' Opp. at 19. Petitioners do not seek such broad and open-ended relief. Rather, they seek only to limit the ability of the school district to mandate volunteering, an activity that until the imposition of mandatory service requirements had always been left to individual and family decision-making. Petition at 25-29.

Nowhere does the school district attempt to respond to petitioners' argument concerning the centrality of voluntary charity to this Nation's history and traditions. The school district correctly cites *Meyer v. Nebraska*, 262 U.S. 390 (1923), as establishing parameters for recognizing what liberties are protected under the Fourteenth Amendment, but it ignores *Meyer*'s crucial holding that the amendment protects those "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399. As the Immediatos set forth in their petition, perhaps no privilege or liberty is more deeply embedded in the common law and in our traditions than that of individuals deciding whether and under what circumstances to perform acts of charity. Petition at 25-29; *see also* Rutherford Inst. *Amicus* Brief at 6-7. Such liberties cannot be usurped by coercive public school programs that require students to serve others in a manner prescribed by school officials.

The school district also incredibly asserts that because compulsory education laws have been held to be constitutional, it can *ipso facto* require students to perform charitable service to others. Respondents' Opp. at 17. In so doing, the school district refuses to recognize any constitutional limitation on the power of public school officials to mandate certain activities in the name of education.

One of the Fourteenth Amendment liberties listed in the *Meyer* opinion demonstrates the indefensible nature of the school district's position. This Court held in *Meyer*

that individuals have a Fourteenth Amendment right to "engage in the common occupations of life," in effect, a right to seek employment. Given this guarantee, could public schools require students as a condition of graduation to obtain out-of-school employment? Such a requirement could easily be justified as a "reasonable" educational program that fostered responsibility and imparted good work skills to young people. Of course, the school district justifies its program on exactly the same grounds. Respondents' Brief at 1-3; Petition at A-50. Nevertheless, a program of forced employment would doubtless be struck down as overextending public school authority by requiring an activity – employment – that has traditionally been left to individuals and, if the individual is a minor, to families.

Moreover, the Immediatos do not challenge the school district's program on the grounds that it is a particularly onerous or burdensome requirement. *See* Respondents' Opp. at 18. They challenge this unique and novel requirement because it mandates an activity that under the common law and the legal traditions of our country must be left to individual conscience and belief.

Public schools can under the Constitution require students to gain certain necessary skills and acquire useful knowledge. However, public schools cannot require students to do anything school officials think may be good for them. Even more importantly, they cannot require students to perform an activity like volunteering that must spring from self-motivation and inspiration, not from a state-imposed obligation. This Court should accept the Immediatos' petition in order to restore the right of individuals to determine whether and under what circumstances they will perform service to others.

CONCLUSION

The decision to perform charitable work through service to others must be between an individual and his or her conscience, not between the individual and the State. The school district should not be allowed to eviscerate this fundamental principle of our constitutional republic in pursuit of educational goals, no matter how laudable the purpose. This Court should grant the Immediatos' petition in order to determine the respective boundaries of public school authority and the rights of families.

Respectfully submitted,

LANCE J. GOTKO
875 Third Avenue
8th Floor
New York, New York
10022
(212) 833-1115

Institute for Justice
WILLIAM H. MELLOR
CLINT BOLICK
*SCOTT G. BULLOCK
1001 Pennsylvania
Avenue, NW
Suite 200 South
Washington, DC 20004
(202) 457-4240

*Counsel of Record

Counsel for Petitioners

Date: June 25, 1996

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No. 95-1861

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On Petition For A Writ of Certiorari
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BRIEF OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

Anne-Marie Amiel
Counsel of Record
John W. Whitehead
THE RUTHERFORD INSTITUTE
1445 E. Rio Road
Charlottesville, VA 22901
(804) 978-3888

Attorneys for Amicus Curiae

June 14, 1996

Balmar Legal Publishing Department, Washington, D.C. (202) 682-9895

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No. 95-1861

IN THE

Supreme Court Of The United States

October Term, 1995

DANIEL IMMEDIATO; DIANE IMMEDIATO;
AND EUGENE IMMEDIATO,

Petitioners,

v.

RYE NECK SCHOOL DISTRICT; KATHLEEN D. GULOTTA;
FRANK SPEDAFINO; BEATRICE CERASOLI;
ALAN MANOCHERIAN; JANICE K. ANDERSON; LIZA
PERELSTEIN; PETER J. MUSTICH,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae is a non-profit civil liberties organization named for Samuel Rutherford, a 17th-century Scottish minister and rector of St. Andrew's University, The Rutherford Institute is comprised of attorneys, judges, physicians, law students, educators and other citizens dedicated to the protection of parental rights, religious liberty, freedom of speech and other constitutional guarantees. Counsel for *Amicus Curiae*

[1] Counsel of record to the parties in the case described above have consented to the filing of the brief and letters of consent have been filed with the Clerk pursuant to Rule 37.

have specialized in litigation in state and federal courts and have participated as counsel in previous significant cases before this Court.

The Rutherford Institute believes that the right of parents to direct and control the moral and educational upbringing of their own children is one of the values most deeply rooted in the law and history of the United States. It is not the function of government to forcibly supplant that role and force all parents to subsume within their family life transient values as defined by government. Any coercive act that attaches a penalty to non-compliance with such a government imposed value diminishes the lives of all citizens and threatens jealously guarded constitutional freedoms. The Rutherford Institute believes that the instant case, addressing as it does these fundamental constitutional liberties, is important to constitutional jurisprudence and the growth and progress of the nation.

Affirming the lower court's decision in the instant case would detrimentally impact the exercise of constitutional freedoms by all citizens. *Amicus Curiae* therefore has a vital interest in seeking reversal of the decision of the lower court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amicus Curiae adopts by reference the statement of facts as set forth in Petitioners' brief filed with this Court.

SUMMARY OF ARGUMENT

This case is not about the undoubted value of community service, or the benefits for all of compassion in action. This case is about the unconstitutional, unwarranted and excessive intrusion of government into the daily lives and beliefs of individual citizens. It is about the fundamental right of parents

to direct the moral education of their offspring and of those individual offspring to make their own decisions about service to others, a right historically recognized by government and judiciary. It is about the danger to a free society of straying from the beliefs that founded this nation and upon which its greatness has been based.

The denial by the lower courts of such a basic right on the part of parents misinterprets the intent of the Fourteenth Amendment to the United States Constitution and the precedents of this Court. The lower court misapprehended the terminology commonly in use at the time of the decisions upon which the court based its opinion (*See* Petition 9-12). It sets a dangerous precedent for future lower court judges who mistakenly believe it to be their duty to make new law dramatically impacting constitutional freedoms.

The notion that state rights over students' free time and moral education so trump those of the family that all the state has to do in order to reduce parents to meaningless babysitters of the state's property is to suggest one potential application of the mandated program raises the ugly specter of Orwellian tyranny.

This case is about the duty of government, and the limits of the power of that government to regulate individual conduct. We respectfully request that this Court grant the Writ in order to clarify for all the fundamental nature of the Fourteenth Amendment protections afforded all individual citizens under the Constitution.

ARGUMENT

I. IN A DEMOCRATIC NATION FUNDAMENTAL LIBERTIES CANNOT BE DEPENDENT UPON THE VEERING WINDS OF POLITICAL OR SOCIAL THEORY, BUT MUST RESIDE IN THE BEDROCK OF CONSTITUTIONAL INTEGRITY.

Good intentions do not make good law. As Justice Brandeis stated so eloquently:

> Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greater dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 479 (1928).

The desirability of encouraging an appreciation in everyone, young and old, of the value of selflessness is not at issue here. That the vision of the "thousand points of light" is a noble one would be denied by few. However, the essence of that vision is the *willingness* of Americans to join together and serve others. Willingness cannot be mandated. Mandatory volunteerism is, indeed, an oxymoron. It reminds one irresistibly of the Armed Forces approach to volunteerism -- "you, you and you!"

In his *On Liberty* John Stuart Mill wrote:

> A government cannot have too much of the kind of activity which does not impede, but aids and stimulates, individual exertion and development. The mischief begins when instead of calling forth the activity and powers of individuals and bodies, it substitutes its own activity for theirs.

On Liberty, Ch. V (1859). The Rye Neck High School Community Service Program has the dubious honor of exactly illustrating this principle.

Beyond the possible damage that required "good works" may do to the future willingness of young people to commit their time to others in a truly voluntary manner, such social experimentation undermines the very freedoms upon which this country was founded. As Madison wrote:

> [T]he preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.

James Madison, *A Memorial and Remonstrance* (1785) (as reprinted in *Everson v. Board of Education*, 330 U.S. 1, 65 (1947)).

Strong words, but the Founders of our nation were men of strong conviction. In *The Rights of Man*, Thomas Paine wrote:

> Government is no further necessary than to supply the few cases to which society and civilization are not conveniently competent; and instances are not wanting to show that everything which government can usefully add thereto, has been performed by the common consent of society, without government.
>
> * * * * *
>
> But how often is the natural propensity to society disturbed or destroyed by the operations of government! When the latter, instead of being ingrafted on the principles of the former, assumes to exist for itself, and acts by partialities of favor and oppression,

> it becomes the cause of the mischief it ought to prevent.

The Rights of Man, Part II Ch. I (1791-92).

The strength of mind and belief which was exhibited by those who wrote our Constitution did not die with their generation. In modern times, Americans have continued to fight for the rights of man, and sentiments very similar to those expressed by Thomas Paine have been professed by numerous people in all walks of life. In the context of programs which espouse community spirit it has even been said:

> [M]aking considerateness. compassion, kindness, generosity, and other virtues pertaining to civilized community life matters of government mandate . . . is a fundamental threat to the quality of human community life . . .

Tibor Machan, "The Petty Tyranny of Government Regulation," in *Rights and Regulation*, ed. Tibor R. Machan and M. Bruce Johnson (Pacific Institute for Public Policy Research, 1983), 287.

The goal of community service might be laudable, but the forced participation imposed upon students by government is intrusive and unconstitutional. That a "no diploma" penalty attaches to resistance to such coercion makes the means used to justify the end even less palatable. The school thereby assumes a role that is not part of the duty of government, that of the deciding authority in the establishing of a system of values for life.

Parents are primarily responsible for inculcating values in their children. Schools have a *secondary* role, in that they are responsible for assisting the primary caregivers. By denying the right of parents to be the primary caregivers and decision-makers in their children's upbringing government, in this instance, further weakens the family structure and increases the potential of causing the anti-social mischief which it misguidedly seeks to correct.

Nothing in the rulings of this Court in *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) can reasonably be held to stand for the subjugation of parental rights to those of the state where the non-curricular educational conceits of the time are concerned. The confusion of the meaning of the term "reasonable" as applied to the 1920's cases with the terminology employed in establishing modern review jurisprudence in 1938 has produced bad, and perhaps unintended, law. The Second Circuit expressed a desire to exercise "judicial self-restraint" in breaking "new ground" (Petition, App. A-13), but then went on to misinterpret the standard of review in *Meyer* and *Pierce*, and to discard the support for parental rights so frequently affirmed by this Court.

In *Farrington v. Tokushige*, 273 U.S. 284 (1927), this Court upheld the fundamental nature of parental rights in an educational case not involving care and custody issues. Then, two decades after the *Meyer* case (and six years after *United States v. Carolene Products*, 304 U.S. 144 (1938)), this Court once again spoke for the parents of America:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

Prince v. Massachusetts, 321 U.S. 158, 166 (1944). In *Ginsberg v. New York*, 390 U.S. 629, 639 (1968), this Court again stressed the importance of the primary role of parents in the nurturing of their children.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court struck down a law requiring attendance at school up to the age of 16. The Court reiterated that there is a "*fundamental* interest of parents, as contrasted with that of the State, to guide the religious future and education of their children." *Id.* at 232

(emphasis added). Interference from the state into the life values training of children by parents is not constitutional.

The statements of this Court regarding the fundamental nature of parental rights cannot be regarded as mere sentiment. The opinions in *Prince* and *Ginsberg* were an affirmation of the underpinnings of the American Constitution and the fundamental nature of family rights which are "deeply rooted in the Nation's history and tradition." (*Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).)

The right of families to guide and direct their internal relationships is a "fundamental liberty interest protected by the Fourteenth Amendment," as this Court held in *Santosky v Kramer*, 455 U.S. 745, 753 (1982). *Santosky* followed a venerable line of cases, including *Meyer* and *Pierce*, in which the family was recognized as a right of first importance by this Court.

One of the most eloquent statements of the dangers inherent in permitting rulings such as that in the instant case to stand is contained in the decision of the court *in Valent v. New Jersey State Board of Education*, 274 A.2d 832 (N.J.Super.Ch.Div. 1971):

> Is the State, through the educational system, permitted to encroach upon the patterns and molding of a child's behavior in personal, family or religious beliefs? Parental discipline, authority and respect diminish as the great sovereign state forces its way into the home as a foster parent. Some parents may be happy to be relieved of the obligation and responsibility. Others may feel that the constant eroding of their usefulness as parents portends great danger, and youth will look to the state, rather than the parent, for guidance.

Id. at 839.

"The vigilant protection of Constitutional freedoms is nowhere more vital than in the community of American

schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Thus, when a conflict arises between the rights of individuals and the actions of school administrators, this Court has consistently made its position clear. As the Court said in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969): "In our system, state-operated schools may not be enclaves of totalitarianism." *Id.* at 511.

In the instant case the lower court, in subordinating the rights of parents to the rights of a paternalistic state, opens a Pandora's box of threats to the family. This is no chimera. In the past year alone, this Court has been asked to review many cases brought by concerned parents, including one involving a challenge by parents to condom distribution in public schools (*Curtis v. School Committee of Falmouth*, 652 N.E.2d 580 (1995), *cert. denied*, 116 S.Ct. 753 (1996)); issues of parental consent to explicit sexual presentations in public schools (*Brown, et al. v. Hot, Sexy and Safer Productions Inc., et al.*, 68 F.3d 525 (1995), *cert. denied* 3/4/96); the overriding by school officials of parental instructions against counseling (*Newkirk v. Fink* (Unreported Case No. 94-1520 6th Cir.; *cert. denied* 10/25/95). *Amicus* has represented numerous parents whose rights to direct the upbringing of their children in respect of education, values training and discipline have been under threat of usurpation by government actors. Even as the instant case is under consideration, *Amicus* is representing the family of a sixth grader who was allegedly subjected to a genital examination at school without proper consent being obtained from either the student or her parents (*Doe v. East Stroudsburg Area School District, et al.*, Case No. CV-96-852 filed on 5/10/96 in the United States District Court for the Middle District of Pennsylvania).

In those cases where this Court ruled in favor of the school officials, there was always at least a potential for excusal from the challenged program. But what opportunity for opting out is there in the instant case? None. If the student does not do his charitable service in full public view (contrary

to the tenets of many religious faiths), and in the form prescribed by the government, he will be denied his high school diploma. Is the message we wish to send our young people today that charity begins at the Capitol, that only government endorsed charity is to be appreciated and rewarded, and that lack of such appreciation carries with it serious consequences? Surely not.

The above-referenced cases are but a very few instances of actions instituted by concerned parents around the country, and do not even include examples of intrusion into the family by state actors other than schools. Further, we see but the tip of the iceberg when we consider only lawsuits filed. The vast majority of protests and concerns never reach a court of law.

The threat to the family is real, and we earnestly request that this Court provide to the vast majority of parents in this country, who increasingly feel themselves to be under siege at the hands of Big Brother, the support that is their due. The failings of a few cannot be used as justification for stripping the many of their constitutional right to make decisions for their own children. As E.L,. Doctorow said in *The Nation*: "The relentless logic of a Constitution in the name of the people is that a national state exists for *their* sake, not the other way around." *Id.* February 21, 1987 (emphasis added).

II. GOVERNMENT ADMINISTERED PROGRAMS WHICH QUALIFY PARTICIPANTS FOR RECEIPT OF BENEFITS BY RELIGIOUS INQUIRY EXCESSIVELY ENTANGLE THE STATE IN MAKING JUDGMENTS REGARDING THE RELATIVE VALUE OF RELIGIOUS ACTIVITY AND ARE UNCONSTITUTIONAL.

A further danger of the unnecessary intrusion of government into purely private actions is that posed by the involvement of state actors in deciding which organizations qualify as "worthy" of inclusion. Schools, by imposing limits on the

types of organizations or groups which are included within the program, make value judgments which they pass on to the children.

In the instant case, there is a very real danger of school officials becoming excessively entangled with religion by their investigation into the extent of "proselytization" involved in working with any religiously-affiliated organization. Organizations that are excluded from the program because of "separation of church and state" issues but which, for any number of reasons, may have been the organization of choice of a particular student, are therefore portrayed as somehow less worthy than other organizations with differing political or social complexions.

Thus the government, in requiring "voluntary" work and setting qualifying rules for its implementation, is establishing a hierarchy of worthiness. It imposes a penalty on those who do not agree with that hierarchy by denying a diploma to anyone who fails to comply, and undermines the rights of families to make their own moral and value decisions. That a court would place on a higher rung of the constitutional ladder the right of government to indoctrinate the young of the nation in certain values to the exclusion of others which are of at least equal value, and would devalue the right of parents to be the primary guiding force of their children's beliefs and values, is a perversion of the Constitution and the freedoms of which we, as a nation, are so proud.

Thomas Jefferson, in proposing his 1779 statute for religious freedom, stated the following:

> 7) that even forcing [a man] to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness;

> 8) and is withdrawing from the ministry those temporary rewards which, proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors for the instruction of mankind;
>
> * * * * *
>
> 13) that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own . . .

The Papers of Thomas Jefferson, vol. 2, edited by Julian P. Boyd (Princeton, 1950), pp. 550-51.

It is unnecessary in this brief to discuss at length the history of the three-prong test for government endorsement of religion as enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Suffice it to say that this Court has consistently held that an essential requirement of the Constitution and of American jurisprudence is that schools may not endorse or disapprove of any religion, either explicitly or implicitly (*Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring). Such perception of endorsement or disapproval is unavoidable in the Rye Neck program.

In *Tinker*, this Court limited the power of the state to inculcate its own particular set of values in students:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are pos-

> sessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

393 U.S. at 511. Even in *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989 (3d Cir.), *cert denied*, 114 S.Ct. 85 (1993), a case where a community service program which utilized many non-discriminatory options for students including the possibility of a student-designed service program, the court rejected the argument that once an educational purpose has been found to exist a community service program is automatically constitutional. *Id.* at 994.

The perceived value to students of an out-of-hours program is not a sufficient justification for the unconstitutional intrusion of the state into family life and decisions, nor is it a sufficient state interest for the unconstitutional evaluation of religious activity for purposes of assessing the value to the community of any particular service program. We therefore respectfully request that this Court grant the Petition for Certiorari and reverse the decision of the lower court.

CONCLUSION

> A constitution is the property of a nation, and not of those who exercise the government.

Thomas Paine, *The Rights of Man*, Part II Ch. IV. *Amicus Curiae* respectfully requests that this Court return to the parent Petitioners the "property" rights they have held for more than 200 years, and which are now under direct and serious threat.

Protection of the fundamental freedoms of the people of the United States requires that the decision of the court below must be reversed.

Respectfully submitted,

Anne-Marie Amiel
Counsel of Record
John W. Whitehead
THE RUTHERFORD INSTITUTE
1445 E. Rio Road
Charlottesville, VA 22901
(804) 978-3888

Attorneys for Amicus Curiae

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No. 95-1861

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL IMMEDIATO, DIANE IMMEDIATO, and EUGENE IMMEDIATO,

Petitioners,

vs.

RYE NECK SCHOOL DISTRICT; KATHLEEN D. GULOTTA, FRANK SPEDAFINO, BEATRICE CERASOLI, ALAN MANOCHERIAN, JANICE K. ANDERSON, LIZ PERELSTEIN; and PETER J. MUSTICH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PLUNKETT & JAFFE, P.C.
*KEVIN J. PLUNKETT, ESQ.
PHYLLIS S. JAFFE, ESQ.
ELIZABETH S. TORKELSEN, ESQ.
HOWARD M. MILLER, ESQ.
Counsel for Respondents
1 North Broadway
White Plains, New York 10601
(914) 948-7722

*Counsel of Record

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No. 95-1861

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL IMMEDIATO, DIANE IMMEDIATO, and EUGENE IMMEDIATO,

Petitioners,

vs.

RYE NECK SCHOOL DISTRICT; KATHLEEN D. GULOTTA, FRANK SPEDAFINO, BEATRICE CERASOLI, ALAN MANOCHERIAN, JANICE K. ANDERSON, LIZ PERELSTEIN; and PETER J. MUSTICH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.8, respondents, RYE NECK SCHOOL DISTRICT; KATHLEEN D. GULOTTA, FRANK SPEDAFINO, BEATRICE CERASOLI, ALAN MANOCHERIAN, JANICE K. ANDERSON, LIZ PERELSTEIN, in their official capacities as members of the Rye Neck School District Board of Education, and PETER J. MUSTICH, in his official capacity as Superintendent of the Rye Neck School District (hereinafter "respondents" or "the school district") submit the within supplemental brief in further opposition to the petition for writ of certiorari of DANIEL IMMEDIATO, DIANE and EUGENE IMMEDIATO,

(hereinafter "Petitioners"), to advise the Court of a recent decision of the Fourth Circuit Court of Appeals which is directly relevant to the case at bar, *Herndon v. Chapel Hill-Carrboro City Board of Education,* No. 95-2525, slip op. (4th Cir. July 11, 1996), 1996 WL 386531. (The text of the decision is annexed hereto). The *Herndon* decision was rendered subsequent to the filing of respondents' initial opposition brief.

In *Herndon,* plaintiff parents claimed that the Chapel Hill-Carrboro City School District's 50-hour community service requirement, with an attendant paper requirement, violated the parent's fundamental right to direct the upbringing of their children.[1] (A-1-A-3). Plaintiff students further claimed that the community service requirement violated their liberty rights and constituted involuntary servitude under the Thirteenth Amendment. *Id.*

The Fourth Circuit rejected each of these claims, stating with respect to the parental rights claim,

> From Meyer to Runyon, the Supreme Court has stated consistently that parents have a liberty interest, protected by the Fourteenth Amendment, in directing their children's schooling. Except when the parents' interest includes a religious element, however, the Court has declared with equal consistency that reasonable regulation by the state is permissible even if it conflicts with that interest. That is the language of rational basis scrutiny. The claimants in this case concede that their interest is not religious, so we must reject their position if the service requirement "bear[s] some rational relationship to legitimate state purposes." Rodriguez, 411 U.S. at 40 (1973). The parents also acknowledge "the basic

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[1] The Chapel Hill-Carrboro City School District also permits students to either choose from an approved list of community service organizations or to select an organization of their own choosing provided they receive preapproval from the Service Learning Committee and/or the principal. *Id.* at 1.

> legitimacy" of the district's interest in teaching students the value of service, and that the service requirement is rationally related to that interest. Thus, under rational basis scrutiny, the requirement does not infringe unconstitutionally on their right to control their children's education. (A-7-A-8).

Thus, three Circuit Courts of Appeal have examined mandatory community service requirements and all three have rejected each and every constitutional challenge.[2] Accordingly, respondents urge this Court to deny the petition for writ of certiorari because the law is well-settled and there is no split among the circuits meriting review by this Court.

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[2] *Herndon v. Chapel Hill-Carrboro City Board of Education,* No. 95-2525, slip op. (4th Cir. July 11, 1996), 1996 WL 386531; *Immediato v. Rye Neck School District,* 73 F.3d 454, 461-462 (2d Cir. 1996); *Steirer v. Bethlehem Area School District,* 987 F.2d 989, 998 (3rd Cir.), *cert. denied,* 510 U.S. 824, 114 S.Ct. 85, 126 L.Ed.2d 253 (1993).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PLUNKETT & JAFFE, P.C.
*KEVIN J. PLUNKETT, ESQ.
PHYLLIS S. JAFFE, ESQ.
ELIZABETH S. TORKELSEN, ESQ.
HOWARD M. MILLER, ESQ.
1 North Broadway
White Plains, N.Y. 10601
(914) 948-7722

Counsel for Respondents

*Counsel of Record

Dated: July 18, 1996

Herndon v. Chapel Hill-Carrboro City Board of Education
No. 95-2525
United States Court of Appeals, Fourth Circuit
Argued March 5, 1996
Decided July 11, 1996

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Frank W. Bullock, Jr., Chief District Judge. (CA-94-196-1)

Before Ervin and Niemeyer, Circuit Judges, and Butzner, Senior Circuit Judge

Opinion

Ervin, Circuit Judge

*1 The Chapel Hill-Carrboro City Schools require as a condition of graduation that high school student perform fifty hours of community service. Two students and their parents sued the Chapel Hill Carrboro-City Board of Education, the individual board members, and the system superintendent (collectively "the district"). The plaintiffs charged that the community service requirement violates the students constitutional rights to freedom from involuntary servitude, personal liberty and privacy; and the parents' constitutional right to direct the upbringing and education of their children. They sought a declaratory judgment and an injunction prohibiting implementation of the requirement. The district court entered summary judgment in favor of the district, finding that the requirement does not violate the plaintiffs' constitutional rights. We agree, and therefore affirm.

I.

Subject matter jurisdiction in the district court was proper under 28 U.S.C. §§2201, 2202 and 1331. We have appellate jurisdiction over the district court's summary judgment under 28 U.S.C. §1291. We review the summary judgment de novo. E.g., Goodman v. RTC, 7 F.3d 1123, 1126 (4th Cir. 1993).

II.

The facts are not in dispute, so we adopt the statement from the district court's opinion:

> Defendant Chapel Hill Carrboro-City Board of Education is a governmental agency and body corporate organized under the education code of North Carolina, N.C. Gen Stat. §115C-40. Its members are charged with administering the Chapel Hill Carrboro City School System. The system's high school, Chapel Hill High School is located in Chapel Hill, North Carolina and had a 1994-95 enrollment of 2,061 students in grades nine through twelve. Defendants Ken Town, Sue Baker, Lavonda Burnette, Mary Bushnell, Judith Ortiz, Mark Royster and Ruth Royster were at the time this action was filed, individuals holding elective office as members of the Chapel Hill Carrboro City Board of Education and each is sued in his or her official capacity.
>
> At the time this action was filed, Defendant Neil G. Pederson was superintendent of the Chapel Hill Carrboro City Schools and an agent and employee of Defendant Board of Education. Defendant Pederson is sued in his official capacity.
>
> Beginning with the graduating class of 1997, students enrolled in the Chapel Hill Carrboro School System are required to complete fifty (50) hours of community service during grades nine through twelve as a condition to receiving a diploma.[1] Failure to complete the program makes a student ineligible for graduation and the program does not contain an opt-out provision for students who object to performing community service. The community

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[1] The hour requirements for students who transfer in to the Chapel Hill Carrboro School System after the ninth grades are prorated.

service required by the Program must be performed after school, on weekends or holidays, or over summer recesses. Students are required to perform a minimum of two different types of services. Clerical work is limited to not more than eight (8) hours, as are fundraising activities. The community service coordinator at Chapel Hill High School keeps on file a list of approved agencies and organizations for whom students may work to satisfy the requirements of the program. The list of organizations for which students may work is extensive and includes many with significantly different purposes and philosophies.

Students may also receive credit for service performed for organizations which are not included on the list of approved organizations. However, in order for a student to receive credit for service performed for an organization not included on the list, a student must receive approval from the Service Learning Committee, a group of teachers, students and members of community organizations charged with administering the Program. Ultimately, however, the principal of the high school is the final decision maker concerning community service credit.

Services for which students receive monetary compensation or which are required as a form of restitution cannot be used to satisfy the requirements of the program. Credit may not be received for service to a for profit organization unless the service provides a benefit to the clients of such organization that they others would not receive. Service provided to a group such as a church or student club, which primarily benefits the organization's members, will not be approved. Neither may activities that promote political parties or individual candidates be credited. Students must set their own work schedule and provide their own transportation

> to and from the location at which they perform community service. The organization for which students perform their services are responsible for providing any training or necessary supervision. When students arrive to perform their service, students must sign in with the organization and a contact person with the organization must document the hours the student works. Students are required to turn verified time sheets in to the school. Each time a student performs service for an organization, he or she is thereafter required to reflect on any "memories or special feelings" gained from the particular service experience. After students complete the fifty (50) hours of required service, they must submit a one-to-two page paper reflecting on their service experiences. 899 F.Supp. 1443, 1446-47 (1995) (citation to appendix omitted).

III.

The plaintiffs do not appeal the district court's finding that the service requirement does not intrude on the students' right to privacy. We address individually the remaining constitutional issues.

A.

The parents argue that the service requirement "violates parents' right to direct and control the upbringing and education of their children secured by the Fourteenth Amendment to the United States Constitution." That right is fundamental, they contend, so any infringement of it is subject to strict judicial scrutiny. Unless the district can demonstrate a compelling interest in implementing the service requirement, they assert, and can show that the requirement is narrowly tailored to advance that interest in the manner least restrictive of the parents' right, the requirement cannot survive strict scrutiny.

The parents' argument is controlled by the substantive due process branch of Fourteenth Amendment jurisprudence. Under that body of law, courts examine whether government

intrusions into citizens' liberties are justified by adequate state interest. We apply a tiered framework of analysis subjecting infringement on liberties deemed constitutionally "fundamental" to a heightened or "strict" level of judicial scrutiny, and examining encroachments on lesser rights under "the traditional standard of review, which requires only that the [challenged state action] be shown to bear some rational relationship to legitimate state purposes." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37-40, 93 S. Ct. 1278, 36 L.Ed.2d 16 (1973).

The Supreme Court long has recognized the existence of parents' right to direct their children's education. It first did so nearly seventy-five years ago in Meyer v. Nebraska, in which a teacher appealed his conviction for teaching German in violation of state law. 262 U.S. 390, 396-97, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). "[W]ithin the liberty of the [Fourteenth] Amendment," the Court held, is a right of parents to seek German instruction for their children. Id. at 400. Two years after Meyer, in Pierce v. Society of Sisters, the Court examined an Oregon statute requiring all children to attend public schools. 268 U.S. 510, 530, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Citing Meyer, it invalidated the statute as "interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control." Id. at 534-35. After two more years, in Farrington v. Tokushige, the Court overturned a Hawaii restriction on foreign language schools, holding that "[t]he Japanese parent has the right to direct the education of his own child without unreasonable restrictions." 273 U.S. 284, 298, 47 S.Ct. 406, 71 L.Ed. 646 (1927).

Meyer, Pierce and Tokishige all use the language of rational relationship review. Meyer, 262 U.S. at 403 ("We are constrained to concluded that the statute as applied is arbitrary, and without reasonable relation to any end within the competency of the state.")(emphasis added); Pierce, 268 U.S. at 534-35 ("unreasonably interferes"); Tokushige, 273 U.S. at 298 ("without unreasonable restrictions"). But all three were decided before the Court developed the current tiered

framework -- when it used only the "traditional" standard of scrutiny, see Rodriguez, 411 U.S. at 40 -- so they provide no dispositive guidance on which standard applies. Strict scrutiny of infringements on fundamental rights was first suggested in 1961. See Poe v. Ullman, 367 U.S. 497, 548, 81 S.Ct. 1752, 6 L.Ed.2d 989 (Harlan, J., dissenting) (1961) ("This enactment [a restriction on contraceptional involves what, by common understanding throughout the English speaking world, must be granted to be a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to strict scrutiny. (citation omitted). And it was not expressly embraced by a majority of the Court until 1971. See Graham v. Richardson, 403 U.S. 365, 375, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971).

The Court came close to deciding which standard protects parental rights in education in Wisconsin v. Yoder, in which it overturned convictions of Amish parents for removing their children from school before age sixteen. 406 U.S. 205, 207, 234, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). Citing Meyer and Pierce, it reaffirmed that parental rights are among the liberties protected by the Constitution. Id. at 232-33. When those rights combine with First Amendment free exercise concerns, the Court held, they are fundamental: "[T]his case involves the fundamental interest of parents as contrasted with that of the State, to guide the religious future and education of their children." Id. at 232 (emphasis added). Because religious concerns were central to the Yoder petitioners' position, the Court did not decide specifically whether the parental rights standing alone, in nonreligious contexts are "fundamental" in the constitutional sense or whether heightened scrutiny applies. But its opinion included dicta that are directly on point:

> [W]e must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and independent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation

> of education if it is based on purely secular considerations.

Id. at 215 (emphasis added).

Soon after Yoder, in Runyon v. McCrary, the Court addressed racial segregation in private schools. 427 U.S. 160, 163, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). It held that the parental liberty recognized in Meyer and Pierce was infringed upon by the prohibition of such segregation, because the law restricted admission policies rather than curriculum or choices of schools. Id. at 177. Thus it did not decide how closely to scrutinize restriction of that liberty. Nevertheless, like Yoder, the Runyon opinion included instructive dicta:

> The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation. See Wisconsin v. Yoder, supra at 213; Pierce v. Society of Sisters, supra at 534; Meyer v. Nebraska, 262 U.S. at 402.

Id. at 178 (emphasis added); accord Church of Lukimi Babalu Aye, Inc. v. City of Hialeah 508 U.S. 520, 567 n. 4, 113 S.Ct. 2217, 124 L.Ed2d 472 (1993) (Souter, J., concurring in part and concurring in the judgment)("Where parents make a 'free exercise claim,'... the Pierce reasonableness test is inapplicable and the State's action must be measured by a stricter test, the test developed under the Free Exercise Clause...").

From Meyer to Runyon, the Supreme Court has stated consistently that parents have a liberty interest, protected by the Fourteenth Amendment, in directing their children's schooling. Except when the parents' interest includes a religious element, however, the Court has declared with equal consistency that reasonable regulation by the state is permissible even if it conflicts with that interest. That is the language of rational basis scrutiny. The claimants in this case concede

that their interest is not religious, so we must reject their position if the service requirement "bear[s] some rational relationship to legitimate state purposes." Rodriguez, 411 U.S. at 40(1973). The parents also acknowledge "the basic legitimacy" of the district's interest in teaching students the value of service, and that the service requirement is rationally related to that interest. Thus, under rational-basis scrutiny, the requirement does not infringe unconstitutionally on their right to control their children's education.[1]

B.

The students also advance a substantive due process argument, "that within the range of personal decisions protected by the Fourteenth Amendment must be the right to determine whether an individual wishes to provide charitable service to others." They acknowledge that there is no precedent for their argument, but claim that the right is rooted in "the long-established common law principle of refusing to transform what many could consider a moral duty (service to others) into a state-imposed obligation."

It is true that common law imposed no duty to serve others. But the absence of a common-law duty does not imply a constitutional prohibition against the imposition of such a duty. The Supreme Court has granted substantive due process protection only to rights that it deems particularly important. Those rights include liberties expressly protected by the Bill of Rights, see Planned Parenthood v. Casey, 505 U.S. 833, 847, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), and others that are not specified in the Constitution but involve "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." Id. at 851

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[1] The Second Circuit addressed this issue earlier this year in Immediato v. Rye Neck Sch. Dist., F.3d 454 (2d Cir. 1996). Citing Pierce, Meyer, Yoder, and Runyon, among other cases, it agreed that parents' right to direct their children's education is subject only to rational-basis review, and that the educational purpose of a community service requirement easily satisfies that standard. Id. at 461-62.

(citing Carey v. Population Servs. Int'l, 431 U.S. 678, 685, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977).

Freedom from compulsory charitable service is not among the rights the Court has recognized, and the Court has expressed forcefully that we should expand the sphere of those rights only with great caution:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution... There should be, therefore, great reluctance to expand the substantive reach of these Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Bowers v. Hardwick, 478 U.S. 186, 194-95, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). Justice O'Connor noted in Casey that the Court has expanded substantive due process beyond the Bill of Rights only to rights that "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy..." 505 U.S. at 851. The decision to serve one's community is important, but it is not so "intimate and personal" that it merits Fourteenth Amendment protection.[2]

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[2] The Second Circuit's Immediato decision addressed this issue, also: In light of the Supreme Court's recent admonition that we should be "reluctant to expand the concept of substantive due process," Collins v. City to Harker Heights, --- U.S. ---, 112 S.Ct. 1061, 1068 117 L.Ed.2d 261 (1992), we decline plaintiff's invitation to be the first court to [hold that the decision whether to serve others is a fundamental right]. Daniel's choice as to how to spend his free time, and whether or not he will perform any volunteer services is not the stuff to which strict scrutiny is devoted. Immediato, 73 F.3d at 463.

C.

Finally, the students argue that requiring them to perform community service violates the Thirteenth Amendment prohibition of involuntary servitude. They argue that while the chief aim of the amendment was to abolish slavery, "involuntary servitude" is a broader concept including, outside of well-established exceptions, any "'control by which the personal service of one man is disposed of our coerced for another's benefit'" Brief of Appellants at 28 (quoting Bailey v. Alabama, 219 U.S. 219, 240-41, 31 S.Ct. 145, 55 L.Ed. 191 (1911)). The district court, following the Supreme Court's statement in Lee v. Weisman that the option not to participate in one's high school graduation is not a voluntary choice, determined that the required service is not voluntary. 899 F.Supp. 1443, 1448 (1995) (citing 505 U.S. 577, 594-95, 112 S.Ct. 2649, 120 K,Ed.2d 467 (1992) (holding that First Amendment Establishment Clause prohibits school-sponsored prayer at public high school graduation ceremony). It held, however, that the labor required by the service requirement is not sufficiently "akin to African slavery" to warrant prohibition under the Thirteenth Amendment. Id. at 1447-49 (quoting Butler v. Perry, 240 U.S. 328, 332, 36 S.Ct. 258, 60 L.E.d 672 (1916). The students contend that the district court's opinion contradicts the plain meaning of the Thirteenth Amendment, because "involuntary servitude" is, simply, service that is not voluntary. To ignore the Amendment's plain meaning in favor of its "general spirit," they argue, is error. Brief of Appellants at 29 (quoting 899 F.Supp. at 1449).

We agree that the district court's reasoning was flawed, but we concur in its conclusion. The court's reliance on Lee v. Weisman was misplaced, for voluntariness under the Establishment Clause is not equivalent to voluntariness under the Thirteenth Amendment. The reach of the Establishment Clause extends beyond forced exposure to particular religious ideas to mere endorsement of them, Court of Allegheny v. ACLU, 492 U.S. 573, 601, 109 S.Ct. 3086,, 106 L.Ed.2d 472 (1989), or "excessive entanglement" with them. Lemon v. Kurtzman, 403 U.S. 602, 614 (21971). Thus the degree of

involuntariness needed to invoke the Establishment Clause is exceedingly low, and includes the "subtle and indirect" pressure generated by school-sponsored, nonsectarian prayer. See Weisman, 505 U.S. at 593. The Weisman Court itself acknowledged that its use of the word "voluntary" was distinguishable form the term's general definition: "[T]he fact that attendance at the graduation ceremonies is voluntary is a legal sense does not save the religious exercise." Id. at 596.

In the Thirteenth Amendment context, "subtle or indirect" pressure to work does not render that work involuntary. In United States v. Kozminski, in applying 18 U.S.C. § 241, the Supreme Court reviewed its previous Thirteenth Amendment decisions: "[O]ur precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion." 487 U.S. 931, 944, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988). Section 241 criminalizes conspiracy against citizens' rights, and applies only the "rights established by the Federal Constitution or laws and by decisions interpreting them," so the Court cautioned that it did not intend its survey to limit conclusively "the potential scope of the Thirteenth Amendment." 487 U.S. at 941, 944 (emphasis added). But the Court previously had limited the scope of involuntary servitude, in Butler, supra, to "those forms of compulsory labor akin to African slavery which, in practical operation, would tend to produce like undesirable results." 240 U.S. at 332.

Graduation from a public high school is an important opportunity, but the threat of not graduating does not rise to the level of "physical or legal coercion." Kozminski, 487 U.S. at 944. More importantly, the community service requirement is in no way comparable to the horrible injustice of human slavery. See Butler, 240 U.S. at 332. Thus it does not violate the Thirteenth Amendment prohibition of involuntary servitude.[3]

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[3] Two other circuits recently have addressed this question. Citing Butler and Kozminski, the Third Circuit held that a mandatory service requirement did not violate the Thirteenth Amendment because it was not "akin

(Footnote continued)

IV.

The district's community service requirement does not intrude on the students' freedom from involuntary servitude, their right to privacy, or their parents' right to direct their upbringing and education. Thus we affirm the district court's summary judgment.

AFFIRMED

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to African slavery.": There is no basis in fact or logic which would support analogizing a mandatory community service program in a public high school to slavery. The record amply supports the defendants' claim that the community service program is primarily designed for the students' own benefit and education, notwithstanding some incidental benefit to the recipients of the services. An educational requirement does not become involuntary servitude merely because one of the stated objectives of the Program is that the students will work "without receiving pay." Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 998, 1000 (3d Cir.), cert. denied, --- U.S. ---, 114 S.Ct. 85, 126 L.Ed.2d 53 (1993). The Second Circuit agreed: Because we conclude that the mandatory community service program is not, on the whole, "compulsory labor" which, "in practical operation" produces "undesirable results" analogous to slavery, Kozminski, 487 U.S. at 492, we hold that the District's mandatory community service program does not constitute impermissible involuntary servitude. Immediato, 73 F.3d at 460.